



Member State Liability in Europe and the United States

Citation

Daniel J. Meltzer, Member State Liability in Europe and the United States, 4 Int'l J. Const. L. 39 (2006).

Published Version

<http://icon.oxfordjournals.org/content/4/1/39.full.pdf>

Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:12070351>

Terms of Use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA>

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

Harvard Law School

Harvard Law School Public Law

Research Paper No. 127

Member State Liability in Europe and the United States

Daniel J. Meltzer

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection at:

<http://ssrn.com/abstract=850364>

MEMBER STATE LIABILITY IN EUROPE AND THE UNITED STATES

Daniel J. Meltzer^{*}

Despite many complexities concerning proper characterization of the European Community (EC) or the European Union (EU),¹ both it and the United States can be called “federal” systems in a broad sense of that term.² Both are multi-dimensional polities that recognize different levels of governance, each with acknowledged power to regulate within a sphere of competence. In both, union law takes priority over Member State law (supremacy),³

^{*} Story Professor of Law, Harvard Law School. I am grateful to the Law Faculty at the European University Institute, who graciously hosted me as a Visiting Fellow in 2004, when some of these ideas had their gestation. For extremely helpful comments, I thank Bill Davey, Gráinne de Búrca, Dick Fallon, Daniel Halberstam, Vicki Jackson, Koen Lenaerts, Jim Pfander, David Shapiro, Ernie Young, and Bruno de Witte. Fernanda Nicola was a special help in launching me in studying the European Union, and Erik Murray-Knox, Florian Sander, and Won Shin provided helpful research assistance.

¹This article refers primarily to the EC, as it discusses EU law under the first of the three “pillars” established by the Treaty on European Union, but not measures under the second and third pillars, where the ECJ’s jurisdiction is restricted. See generally Gráinne de Búrca, *The Institutional Development of the EU: A Constitutional Analysis*, in *THE EVOLUTION OF EU LAW* 55, 66-69 (Paul Craig & Gráinne de Búrca eds., 1999).

²Whether federalism, a label of many meanings, properly characterizes the EU is controverted both by politicians, see, e.g., Symposium Transcript, *A New Constitution for Europe--Major Innovations of the Proposed New European Constitution Treaty*, 23 PENN ST. INT’L L. REV. 1, 10-11 (2004), and scholars, see, e.g., Robert Howse & Kalypso Nicolaidis, *Introduction to THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 1 (Kalypso Nicolaidis & Robert Howse eds., 2001). But I follow others in using it in the broad sense noted in text, see Koen Lenaerts, *Federalism: Essential Concepts in Evolution--The Case of the European Union*, 21 FORDHAM INT’L L. J. 746, 746-52 (1998); Howse & Nicolaidis, *supra*, at 5; J.H.H. Weiler, *Federalism Without Constitutionalism: Europe’s Sonderweg*, in *THE FEDERAL VISION*, *supra*, at 54, while sidestepping whether other labels--confederal, supranational, intergovernmental, infranational, some combination of the above--might also be appropriate.

³See, e.g., J.H.H. Weiler, *Epilogue: The European Courts of Justice: Beyond ‘Beyond Doctrine’ or the Legitimacy Crisis of European Constitutionalism*, in *THE EUROPEAN COURT AND NATIONAL COURTS--DOCTRINE AND JURISPRUDENCE* 365 (Anne-Marie Slaughter, Alec

can be enforced in court against Member States by private parties (direct effect), and thus obliges the courts of Member States to treat the law of the union differently from conventional international agreements.⁴

Both polities have had to define the appropriate place of Member State liability in a system of remedies for violation of the statutory or “constitutional”⁵ law of the center.⁶ State liability may be viewed as an important remedy for individuals whose rights have been infringed, an important tool for enforcing the supremacy of federal law, and a politically sensitive sanction

Stone Sweet & Joseph H.H. Weiler eds., 1998) [hereafter Weiler, *Epilogue*.]

⁴See, e.g., Joseph H.H. Weiler & Ulrich R. Haltern, *Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz*, in THE EUROPEAN COURT AND NATIONAL COURTS--DOCTRINE AND JURISPRUDENCE, *supra* note 3, at 40. The supremacy of American federal law is no longer at issue. The ECJ’s elaboration of a similarly broad conception of supremacy, see *Costa v. ENEL*, Case 6/64, [1964] ECR 585, 593; Weiler, *Europe’s Sonderweg*, *supra* note 3, at 56, was innovative from the perspective of international law, in which the principle that national law of a treaty member yields to treaty provisions applies to relations among nations on the international plane but not to domestic legal disputes in national courts. See Bruno de Witte, *Direct Effect, Supremacy and the Nature of the Legal Order*, in THE EVOLUTION OF EU LAW, *supra* note 1, at 177, 182-83 [hereafter de Witte, *Direct Effect*]. Although “monist” nations may choose to give international law primacy and direct effect in their national legal orders, the ECJ’s quite different view is that the supremacy and direct effect of European law is a matter not of national choice but by EC law. *Id.* at 194. European Member States have generally accepted supremacy in practice, see KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW xii, 26-27 (2001), but not entirely in principle, instead settling on “a ‘peaceful coexistence’ whose maintenance is in the hands of the political and judicial institutions of the Member States.” Bruno de Witte, *Sovereignty and European Integration: The Weight of Legal Tradition*, in THE EUROPEAN COURT AND NATIONAL COURTS, *supra* note 3, at 277, 292-93 [hereafter de Witte, *Sovereignty*].

⁵The European Court of Justice (ECJ) has called the European treaties the “constitutional charter” of the EC. Case 294/83, *Parti Écologiste Les Verts v. European Parliament*, [1986] ECR 1339, ¶ 23. Despite arguments that constitutions are for states and that Europe is a polity formed by international agreement, see, e.g., Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUR. L. J. 282 (1995), positing a sharp dichotomy between a “constitutional” and “international” legal order may be unilluminating in this context. See, e.g., Weiler & Haltern, *supra* note 4, at 336-40.

⁶de Witte, *Direct Effect*, *supra* note 4, at 191.

that threatens legitimate interests of Member States.

The EC has, since 1991, recognized a general doctrine of Member State liability in damages for violation of EC law. American states, by contrast, generally possess sovereign immunity from private damage claims for violation of federal law, a doctrine whose expansion in recent decades has led to the invalidation of numerous federal statutes seeking to overcome that immunity.⁷ Thus, here is a striking contrast in U.S. and European approaches that, at first blush, seems quite paradoxical. One might expect the United States--an older, more established, uncontroversially federal system, with a strong national government, an explicit principle of the supremacy of federal law, and an unquestioned national political community--to have fewer concerns about the imposition of state liability than the newer, less powerful, and far more fragile European polity. But the doctrinal pattern is just the opposite.

I suggest below that no single factor, but a cluster of differences between the EC and the United States, might account for the paradoxical doctrinal pattern. Those differences include the factual circumstances of the respective seminal cases; the historical setting in which they arose; the greater hospitability to governmental liability of civil as compared to common law systems; the stronger set of alternative mechanisms for enforcement of federal law in the United States; the stronger political control over judicial appointments in the United States; and the stronger safeguards against unwanted federal intrusions in Europe. Yet neither polity's approach was historically inevitable; indeed, in the United States, the Supreme Court has been just one vote away from changing course. Nonetheless, the differences noted may help to explain why imposition of state liability was deemed to be more important to the center and less threatening

⁷See p. ???, *infra*.

to the Member States in the EC than in the United States.

I. AN OUTLINE OF EXISTING DOCTRINE

I begin by outlining the respective liability/immunity doctrines in the EC and the U.S.

A. State Liability in Europe

The EC's foundational decision in *Francovich and Bonifaci v. Italy*⁸ arose from Italy's failure to transpose an EC directive requiring Member States to establish a system to protect employees' wage claims against insolvent employers.⁹ Former employees of insolvent Italian companies sued the Italian government for failing to discharge Community obligations--a failure the ECJ had previously established in an earlier proceeding against Italy by the European Commission for not having transposed the directive by the prescribed deadline.¹⁰ Two Italian courts found no remedy in Italian law for a violation of European law,¹¹ but referred to the ECJ, under Article 234 (ex Article 177),¹² the question whether a private party harmed by a Member State's failure to implement a directive may sue the state for damages.

⁸Joined Cases C-6/90 & C-9/90, [1991] E.C.R. I-5357.

⁹In a directive, the EC legislates a framework of objectives and requirements but, rather than imposing a uniform scheme, instead require Member States to enact legislation to implement ("transpose") the directive. For a thoughtful comparison of directives to the American constitutional doctrine prohibiting Congress from "commandeering" American states to enact implementing legislation or to execute federal measures, see Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in THE FEDERAL VISION, *supra* note 2, at 213.

¹⁰Case 22/87, *Commission v. Italy*, [1989] ECR 143.

¹¹See Carol Harlow, *Francovich and the Problem of the Disobedient State*, 2 EUR. L. J. 199, 202 (1996).

¹²The preliminary reference procedure authorizes, and sometimes requires, national courts to refer issues of European law for decision by the ECJ.

The ECJ answered that question in the affirmative. The ECJ first determined that the employees could not sue Italy for violating the substance of the directive, as it lacked “direct effect.”¹³ The problem was not that the right to protection of wages was insufficiently clear,¹⁴ but rather that the directive did not specify *which institution* must protect wages: Italy could have created a public or private system, and had it done the latter, the government would not have been liable for the wage claims. But the ECJ proceeded to find that the employees could sue Italy for its failure to transpose the directive into a national law creating some system (public or private) to provide the required protection. The Court proceeded to outline (without discussion of their provenance) three conditions for the availability of this right to damages for the failure to implement a directive: (1) the results prescribed by the directive entail the grant of rights to individuals; (2) the content of those rights can be identified; and (3) there is a causal link between the state’s breach and the damage suffered by the claimants.¹⁵ The Court added that it is for national legal systems to prescribe the procedural rules by which this right to reparation may be enforced, so long as those rules are not less favorable than those governing “similar domestic claims” and do not make it virtually impossible or excessively difficult to obtain compensation.¹⁶

¹³Joined Cases C-6/90 & C-9/90, *Francovich and Bonifaci v. Italy*, [1991] E.C.R. I-5357, Paragraphs 10-27.

¹⁴The primary criterion for whether European legislation has direct effect is whether the obligations created are sufficiently precise and unconditional to permit application in national courts. See generally de Witte, *Direct Effect*, *supra* note 4.

¹⁵*Francovich*, Paragraph 40.

¹⁶*Francovich*, Paragraphs 42-43. The stated qualifications were established principles of EC remedial law. See note 129, *infra*.

The ECJ has since extended the reach of Member State liability. It embraces not only outright failure to implement a directive, as in *Francovich*, but also the failure properly to implement a directive,¹⁷ the enactment of national legislation that violates the EC Treaty,¹⁸ and administrative action that violates EC law.¹⁹ State liability exists whether or not the European law in question has direct effect; thus, the doctrine does more than fill a possible remedial gap in cases (like *Francovich*) where rightholders could not invoke the direct effect of EC law.²⁰

Since *Francovich*, the Court has also reshaped the conditions of liability. Today, state liability will be recognized if (1) the rule of law was intended to confer rights on individuals, (2) the breach of community law was “sufficiently serious,” and (3) there is a direct causal link between breach of the obligation and damages sustained.²¹ With respect to the second criterion, cases (like *Francovich*) involving outright failure to implement a directive ordinarily constitute a sufficiently serious breach;²² in other cases, a finding of a sufficiently serious breach is anything

¹⁷See Cases C-392/93, *R. v. HM Treasury, ex parte British Telecommunications PLC*, [1996] ECR I-1631.

¹⁸See, e.g., Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others*, [1996] ERC I-1029.

¹⁹Case 5/94, *R. v. Ministry of Agriculture, Fisheries, and Food (MAFF), ex parte Hedley Lomas Ltd.*, [1996] ECR I-2553.

²⁰See, e.g., Joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others*, [1996] ERC I-1029, Paragraphs 18-22; P.P. Craig, *Once More Unto the Breach: The Community, The State and Damages Liability*, 113 L. Q. REV. 67, 68 (1997).

²¹See Joined Cases C-46/93 and 48/93, *Brasserie du Pêcheur SA v. Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others*, [1996] ERC I-1029, Paragraph 51.

²²See Joined Cases C-178-9/94 & 188-90/94, *Dillenkofer and others v. Federal Republic*

but automatic.²³ As reformulated, the doctrine roughly tracks that governing the liability of the Community itself, under Article 288 (ex 215), for harm caused by the improper use of its legislative powers--a parallel that the ECJ has explicitly articulated.²⁴

B. State Sovereign Immunity in the United States

The American doctrine of state sovereign immunity presents a sharp contrast to EC law. American states, absent their consent, ordinarily possess sovereign immunity shielding them from damages liability to private individuals for a violation of federal law,²⁵ no matter how

of Germany, [1996] ERC I-4845, Paragraphs 21-23.

²³See P.P. Craig, Francovich, *Remedies and the Scope of Damages Liability*, 109 L. Q. REV. 595, 604-21 (1993). On the meaning of sufficiently serious breach, see, e.g., Case 392/93 R. v. H.M. Treasury ex parte British Telecommunications, PLC, [1996] ERC I-1029; Joined Cases T-481 & 484/93, Vereniging van Exporteurs in Levende Varkens and others v. Commission, [1995] ERC II-2941.

²⁴See, e.g., Joined Cases C-46/93 & 48/93, Brasserie du Pêcheur SA v. Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others, [1996] ERC I-1029, Paragraphs 28-29, 41-53; Case C-352/98 P, Laboratoires Pharmaceutiques Bergaderm SA and Goupil v. Commission, [2000] ECR I-5291, Paragraph 41. The parallel between Member State and Community liability is not perfect. See Rachael Craufurd Smith, *Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection*, in THE EVOLUTION OF EU LAW, *supra* note 1, at 287, 305. Community institutions generally enjoy broader political discretion than national governments, and a breach is less likely to be “sufficiently serious” when the law affords wide discretion. See Brasserie du Pêcheur, *supra*, Paragraphs 46-50, 56. Moreover, because most implementation of EC law occurs at the national level, EC administrative action is less likely to give rise to a damages claim. See Takis Tridimas, *Liability for Breach of Community Law: Growing Up and Mellowing Down?*, in TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE 150, 175 (Duncan Fairgrieve, Mads Andenas & John Bell eds., 2002). Finally, Community liability to individuals under Article 288 (ex 215) is constrained by highly restrictive standing rules, see PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES & MATERIALS 487-503 (3d. ed. 2003), while EC law obliges national courts to provide broad access to private claims that Member States have violated EC law, see MICHAEL DOUGAN, NATIONAL REMEDIES BEFORE THE COURT OF JUSTICE 5 (2004); Tridimas, *supra*, at 176.

²⁵See, e.g., Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

blatant the violation or serious the harm.²⁶

But this general principle is subject to a number of qualifications. First, while Congress ordinarily may not overcome state immunity so as to render states liable to private individuals, it does have that power when legislating under Section Five of the Fourteenth Amendment to enforce constitutional rights that are recognized in Section One of that Amendment²⁷ (which include nearly all constitutional rights that individuals enjoy against the states). At first blush, state immunity from damages for constitutional violations may seem to be merely a default rule that Congress may (but in general has not chosen to) change. But not only does override require congressional action, but the scope of congressional power is limited. The bulk of federal legislation regulating the states--for example, fair labor standards law, prohibitions on employment discrimination on the basis of age or disability, bans on infringing patents, copyrights, or trademarks--cannot be upheld as an exercise of power under Section Five, and while such legislation is a valid exercise of other grants of legislative power (most commonly, the power to regulate interstate commerce),²⁸ the federal government lacks power to overcome

²⁶Indeed, while American law, like EC law, recognizes a general principle that a state court may not discriminate against the enforcement of federal rights (by according them less favorable treatment than analogous state law rights), see, *e.g.*, *Testa v. Katt*, 330 U.S. 386 (1947), in *Alden v. Maine*, 527 U.S. 706, 758 (1999), the Supreme Court effectively permitted such discrimination with respect to actions against the state government. For criticism, see, *e.g.*, Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 965-66, 1003-04 (2000).

²⁷See, *e.g.*, *Tennessee v. Lane*, 124 S.Ct. 1978 (2004); *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

²⁸See, *e.g.*, *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999).

state sovereign immunity when private parties sue for violations of those statutes.²⁹

A second limit of sovereign immunity arises from the oddity that it shields the states themselves but not their political subdivisions like cities and counties³⁰--even though state law creates those subdivisions,³¹ federal law is indifferent to whether they do so, and the functions performed by state agencies in one state may be performed by political subdivisions in another. Thus, Congress can make the city of Chicago, but not the State of Illinois, liable in damages for copyright infringement or age discrimination. American local governments generally have primary responsibility for such matters as law enforcement, elementary and secondary education, and housing and land use policy; collectively, they employ more people and spend nearly as much money as do state governments.³² Thus, their amenability to suit is a significant limitation of the general notion of state sovereign immunity.

Finally, the Anglo-American doctrine of sovereign immunity has always been accompanied by a regime permitting private parties to sue government officials for specific relief

²⁹The same is true with respect to violations by states of their obligations under the dormant commerce clause (which has been read as a kind of constitutional free trade provision that is self-actuating even absent federal legislation). Thus, the federal government lacks power to impose state liability with respect to the federal duties most similar to the core of European law.

³⁰See, *e.g.*, *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

³¹See, *e.g.*, GERALD E. FRUG et al., *LOCAL GOVERNMENT LAW* 138-40 (3d ed. 2001).

³²See *STATISTICAL ABSTRACT OF THE UNITED STATES*, 2004-05 at 272, tbl 429 (in 2001, there was \$1.07 trillion in local government spending and \$1.19 trillion in state government spending), 292 tbl 454 (in 2002, there were 13,277,000 local government employees and 5,072,000 state government employees).

and for damages (to be paid from the personal assets of the officials).³³ These suits are not necessarily barred even when, for all practical purposes, they are indistinguishable from actions against the state (as is true, for example, of most actions to enjoin state officials from enforcing state legislation alleged to violate federal rights).³⁴ Yet a private plaintiff cannot always circumvent state immunity by framing an action as one against officials, and most importantly, cannot obtain compensation (or other forms of “retrospective” relief) from the state itself for past violations of federal law.³⁵

Some commentators assert that a regime of personal liability of officials is, in practice,

³³For a classic discussion, see Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963). Those damage actions, while originally brought under the tort law of the states, have been understood, at least since *Monroe v. Pape*, 365 U.S. 167 (1961), to be a federally-provided statutory remedy under 42 U.S.C. § 1983, thus paralleling the “federal” basis for the *Francovich* remedy.

³⁴See, e.g., *Ex parte Young*, 209 U.S. 123, 173-74 (1908) (Harlan, J., dissenting). If only the party of record could be sanctioned for contempt of an injunctive order, then suits against states and against officers would not be equivalent. But in *Hutto v. Finney*, 437 U.S. 678, 691-92 & nn. 17, 19 (1978), while sovereign immunity would have barred an initial award of damages from the state treasury for the constitutional violations at issue, the Court upheld an award of \$20,000 in attorneys fees from the state treasury to compensate for legal expenses suffered as the result of the state’s bad faith following the issuance of injunctive orders against state officials. Responding to objections that a retrospective award for bad faith could be made only against the personal assets of the officials who had been enjoined, the Court said that to award the fees against the officers personally “would be a remarkable way to treat individuals who have relied on the Attorney General to represent their interests throughout this litigation.” *Id.* at 692 n. 19. Notwithstanding various limits to the scope of this holding, see Gordon G. Young, *Enforcement of Federal Private Rights Against States After Alden v. Maine: The Importance of Hutto v. Finney and Compensation Via Civil Contempt Proceedings*, 59 MD. L. REV. 440, 457-58 (2000), lower courts have issued compensatory contempt orders against the states in a broader set of circumstances. See generally Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1334 n. 17 (2001).

³⁵See, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974).

tantamount to state liability,³⁶ contending that because state governments broadly indemnify officials held liable, an injured plaintiff can (in two steps rather than one) obtain compensation ultimately paid by the state treasury.³⁷ To the extent that this claim (which I believe to be considerably overstated³⁸) is persuasive, it suggests greater similarity between American and European systems than first appears.

Another parallel resides in the conditions of liability. European law imposes damages liability only for a sufficiently serious breach--a standard that depends on, “inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the text and, more particularly, the margin of discretion available to the author of the act in question.”³⁹ Whether a violation is “serious” turns in substantial part on whether “settled case-

³⁶See, e.g., John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49-50 (1998).

³⁷A state’s voluntary decision to indemnify state officials does not transform actions against officials into actions against the state barred by sovereign immunity. See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHLSER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 999-1000 (5TH ED. 2003) [hereafter HART & WECHSLER].

³⁸Some state officials--notably those exercising prosecutorial and judicial functions--enjoy absolute immunity from damages; with no prospect of official liability, there is no prospect of indirect governmental liability via indemnification. See *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutorial immunity); *Stump v. Sparkman*, 435 U.S. 349 (1978) (judicial immunity). Moreover, indemnification is a matter of state discretion and in practice is limited in numerous respects. Finally, even where officials are liable and the state indemnifies, complex questions arise about the posited equivalence of state liability and official liability plus indemnification. Compare Meltzer, *supra* note 34, at 1360, with Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 881 n. 92 (2000).

³⁹See Joined Cases C-46/93 and 48/93, *Brasserie du Pêcheur SA v. Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others*, [1996] ERC I-1029, Paragraph 43. See also Case C-352/98 P, *Laboratoires Pharmaceutiques Bergaderm SA and Goupil v. Commission*, [2000] ECR I-5291, Paragraph 43 (“the decisive test” of whether a breach “is sufficiently serious is whether the Member State . . . manifestly and gravely

law” makes the violation clear⁴⁰ or whether the error or law was excusable.⁴¹ Similarly, the American doctrine of official immunity generally precludes damages liability of officials who have not violated “clearly established” federal law.⁴² Thus, both polities generally preclude damages liability unless a violation of federal law passes a considerable threshold of clarity, and both polities have been viewed by some as “creating an illusion of remedy where few remedies are in practice found.”⁴³ (This is not to say the standards are identical, or that Americans, under the influence of legal realism, may not be more disposed than Europeans to find law to be unsettled.) A final dimension of similarity of EC and American doctrines governing state liability is that both are heavily shaped by the parallel doctrine governing the scope of liability of the “federal” government.⁴⁴ While in neither polity are federal and state liability doctrines

disregarded the limits on its discretion”).

⁴⁰DOUGAN, *supra* note 24, at 244-45.

⁴¹See Advocate General’s Opinion in Case C-224/01, Gerhard Köbler v. Republik Österreich, [2003] E.C.R. I-10239, Paragraph 139.

⁴²See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (setting forth the standard governing the qualified immunity of executive officials not exercising prosecutorial functions sued for constitutional violations). The scope of immunity in actions under specific federal statutes (for example, the copyright and patent laws) that apply to state as well as private actors is unclear. See Meltzer, *supra* note 34, at 1357-59.

⁴³See *Harlow*, *supra* note 11, at 222. For representative commentary on the American side, see, e.g., Roger C. Hartley, *Alden Trilogy: Praise and Protect*, 23 HARV. J. L. PUB. POL’Y 323, 392-404 & sources cited (2000). On the European side, see Edward Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT’L L. J. 1, 35 & n. 164 (2001).

⁴⁴American decisions on federal and state sovereign immunity routinely borrow from each other. See, e.g., *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998) (“In considering whether [state sovereign immunity] applies . . . , this Court’s decisions in cases involving the sovereign immunity of the Federal Government in [similar circumstances] provide guidance, for this Court has recognized a correlation between sovereign immunity principles

identical,⁴⁵ as a first approximation Member States in both the EC and the U.S. are liable in circumstances in which the federal government would be liable for a similar violation of law.

Still, one should not exaggerate these similarities. EC state liability is far broader, applying to all organs of government.⁴⁶ Thus, legislatures are liable (whether for failing to act, incorrectly transposing directives, or maintaining legislation contrary to European law),⁴⁷ even though they are the traditional locus of sovereign authority and their actions typically involve the greatest measure of political discretion. And, as I discuss in detail below, Member States are also liable for judicial action.⁴⁸ By contrast, in the United States, although legislative measures can be challenged (not only by defendants asserting their unconstitutionality but also by plaintiffs seeking affirmative relief),⁴⁹ a state's failure to legislate is viewed as a constitutionally

applicable to States and the Federal Government.”). On the similarity in the EC, see, *e.g.*, Walter van Gerven, *The Emergence of a Common European Law in the Areas of Tort Law: The EU Contribution*, in TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE, *supra* note 24, at 125, 132-34; Tridimas, *supra* note 24, at 150, 169-78. But see *id.* at 158 (noting the absence of borrowing on the question of causation).

⁴⁵For example, while an American state sometimes can be held liable without its consent (when Congress validly abrogates state sovereign immunity), the United States is not subject to unconsented liability. On the European situation, see note 24, *supra*.

⁴⁶In this respect, EC doctrine resembles international law doctrine, under which a nation ordinarily may not excuse a violation on the basis that it was caused by some constituent part. See, *e.g.*, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 27.

⁴⁷See Joined Cases C-46/93 and 48/93, *Brasserie du Pêcheur SA v. Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others*, [1996] ERC I-1029. See generally Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 772-76 (2004).

⁴⁸See pp. ??-??, *infra*.

⁴⁹State legislatures have sovereign immunity, and individual legislators possess an absolute immunity from suit (not merely from damages liability) for “legislative acts”. *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980). Suits

protected aspect of state sovereignty that cannot be made a violation of federal law,⁵⁰ and damages liability for illegal action of a state court or its officials is virtually unheard of.⁵¹

II. CONCEPTIONS OF STATE LIABILITY AND STATE SOVEREIGN IMMUNITY

Whatever the extent of practical convergence of American and European doctrines, the conceptions in Europe and the United States that underlie state liability/state immunity doctrine differ sharply. As will be noted, in both cases the conception is not strongly rooted in constitutional text but rather is drawn out of structural concerns identified by the respective high courts.

A. Europe

The ECJ's state liability doctrine exhibits its use of teleological reasoning⁵² and the Court's central role in promoting integration within the European Community.⁵³ Not only does

complaining that the actual or threatened enforcement of legislative measures violates federal law can, however, be brought against state executive officials who implement such measures. See, e.g., *Ex parte Young*, 209 U.S. 123 (1908).

⁵⁰See Halberstam, *supra* note 9, at 213.

⁵¹See pp. ???-??, *infra*.

⁵²See, e.g., Anne-Marie Burley, *Democracy and Judicial Review in the European Community*, 1992 U. CHI. LEGAL F. 81, 90-91; Thijmen Koopmans, *The Theory of Integration and the Court of Justice*, in JUDICIAL REVIEW IN EUROPEAN UNION LAW 45 (David O'Keeffe & Antonio Bavasso eds. 2000).

⁵³See, e.g., CRAIG & DE BÚRCA, *supra* note 24, at 87; G. Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 MOD. L. REV. 175, 186 (1994) (describing integrationism as a "genetic code transmitted to the Court by the founding fathers"); Paul Davies, *The European Court of Justice, National Courts, and the Member States*, in EUROPEAN COMMUNITY LABOUR LAW: PRINCIPLES AND PERSPECTIVES 95, 96 (Paul Davies et al. eds. 1996) (quoting former ECJ Judge H. Kutscher's statement that the greatest influence on the Court has been "'the principle of the progressive integration of the Member States in order to attain the objectives of the Treaty'").

the *Francovich* decision not follow from the text of the treaty,⁵⁴ but two treaty provisions--one recognizing the non-contractual liability of *Community institutions*,⁵⁵ the other establishing a procedure by which *the Commission* may obtain *limited remedies* for Member State violations of EC law⁵⁶--could be viewed as excluding, by negative implication, *state liability* in *damages* to *private parties*.⁵⁷ Instead, in *Francovich* the ECJ rested on basic principles concerning the community legal order said to be “inherent in the system of the Treaty”⁵⁸: national courts must ensure that community rules “take full effect” and “must protect the rights which they confer on individuals,”⁵⁹ and “[t]he full effectiveness of Community rules would be impaired and the protections of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a

⁵⁴See Carol Harlow, *Voices of Difference in a Plural Community*, 50 AM. J. COMP. L. 339, 359 (2002). The Court did refer in passing to the Treaty’s requirement, in Article 10 (ex Article 5), that Member States “take all appropriate measures . . . to ensure fulfilment of their obligations under Community law,” as offering “a further basis” for the Court’s conclusion, *Francovich*, [1991] ECR I-5357, Paragraph 36, but later acknowledged in *Brasserie du Pêcheur* that the Treaty “contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States,” [1996] ERC I-1029, Paragraph 27.

⁵⁵Article 288 (ex 215).

⁵⁶Articles 226-28 (ex 169-71).

⁵⁷See James E. Pfander, *Member State Liability and Constitutional Change in the United States and Europe*, 51 AM. J. COMP. L. 237, 256-57 (2003). But in this respect, the bridge had been crossed in Case 26/62, *Van Gend & Loos v. Netherlands Inland Revenue Service*, 1963 E.C.R. 1, where the ECJ rejected the argument that the existence of Articles 226-27 (ex 169-70), expressly authorizing an action against a Member State by the Commission or a sister state, impliedly excluded recognition of a right of action by private parties.

⁵⁸*Francovich*, Paragraph 35.

⁵⁹*Francovich*, Paragraph 32.

Member State can be held responsible.”⁶⁰ Thus, while starting with the international law origins of the EC, the ECJ has viewed the treaty partners as having agreed to subject themselves to an unusual degree of supranational judicial supervision, by creating a new legal order based on the supremacy and direct effect of European law and state liability for its violation, in order to ensure reciprocal respect for the rule of law and to carry out the purposes of the treaty as construed by the ECJ.⁶¹

The Court did not discuss whether the damages remedy it recognized was necessary in view of the existence of other legal remedies (whether national or European) for violation of EC law. Remedies for violations of fundamental law can, Richard Fallon and I have argued, be viewed as serving two distinct functions--compensation of individuals and ensuring compliance by governments.⁶² While a compensatory focus surely draws attention to a damages remedy, that remedy is only one of many that could be afforded in order to ensure compliance⁶³--and some have viewed *Francovich* as more concerned with compliance than with compensation.⁶⁴ The ECJ, however, simply assumed that a damages remedy was appropriate.

⁶⁰*Francovich*, Paragraph 33. See generally CRAIG & DE BÚRCA, *supra* note 24, at 98; Halberstam, *supra* note 47, at 734-36 (Member States have a duty of cooperation to promote the success of the polity as a whole).

⁶¹See *Costa v. ENEL*, Case 6/64, [1964] ECR 585, 593-94; *Commission v. Luxembourg and Belgium*, Joined Cases 90 and 91/63, [1964] E.C.R. 625, 631; *Francovich*, Paragraph 31.

⁶²See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1777-91 (1991).

⁶³See *id.* at 1788-90.

⁶⁴See Harlow, *supra* note 11, at 205; Roberto Caranta, *Judicial Protection Against Member States: A New Jus Commune Takes Shape*, 32 COMMON MKT. L. REV. 703, 725 (1995); Josephine Steiner, *From Direct Effects to Francovich: Shifting Means of Enforcement of Community Law*, 18 EURO. L. REV. 3 (1993).

More broadly, the *Francovich* opinion displays little uncertainty. Although it may have generated more academic debate than any other decision,⁶⁵ it features, like ECJ opinions generally, an impersonal voice, reasoning that is syllogistic or at least abbreviated, confidence that only one answer is possible, and no dissenting opinions.⁶⁶ Thus, counter-arguments (such as concerns that Member State liability diverts funds that political leaders might have directed elsewhere, or that national courts, on whom responsibility would fall for imposing the European damages remedy, might not do so faithfully) get little play. Relatedly, the ECJ “has not genuinely tried to construct its own alternative doctrine of sovereignty,”⁶⁷ and hence *Francovich* expressed no concern about whether state liability unduly interfered with Member State autonomy.

B. The United States

The U.S. Constitution, like the European Treaties, is generally devoid of remedial specification.⁶⁸ But the federal government has long enjoyed sovereign immunity, despite the

⁶⁵Opinion of the Advocate General in Case 5/94, *R. v. Ministry of Agriculture, Fisheries, and Food (MAFF), ex parte Hedley Lomas Ltd.*, [1996] ECR I-2553, Paragraph 52.

⁶⁶See generally Mitchel De S.-O L'E Lasser, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* 104-12 (2004). Opinions of Advocate Generals, Lasser notes, do acknowledge interpretive choice, express personal views, and rely more on purposive hermeneutics. *Id.* at 113-41.

⁶⁷de Witte, *Sovereignty*, *supra* note 4, at 287.

⁶⁸On the U.S. example, see Fallon & Meltzer, *supra* note 62, at 1779 & n.244. On the EC see Erin F. Delaney, “*Right to an Effective Remedy*”: *Judicial Protection and European Citizenship*, The Federal Trust Online Paper 17/04, August 2004, http://www.fedtrust.co.uk/uploads/constitution/17_04.pdf, at 3.

lack of any textual foundation,⁶⁹ and state sovereign immunity draws heavily on the concerns on which the federal doctrine rests. Those concerns include “[t]he affront to the dignity of the sovereign, * * * [t]he inability of the courts to enforce a judgment * * *, * * * ‘[t]he `logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends,’ * * * [and t]he avoidance of interference with government functions”.⁷⁰ (These rationales have been sharply criticized as unconvincing in a nation born in rebellion against a monarchy and founded on a written Constitution expressing the sovereignty of the people,⁷¹ and as unnecessary to respect legitimate concerns about judicial interference with governmental operations that can be accommodated by more limited and nuanced doctrines.)

Although recognition of sovereign immunity for the United States hardly requires recognizing a similar immunity for the states, especially with respect to violations of supreme federal law, the Supreme Court has advanced textual, historical, and teleological bases for recognizing state sovereign immunity. The textual basis is the Eleventh Amendment to the Constitution: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” The amendment, adopted in

⁶⁹Hill v. United States, 50 U.S. (9 How.) 386 (1850); United States v. McLemore, 45 U.S. (4 How.) 286 (1846).

⁷⁰See HART & WECHSLER, *supra* note 37, at 944-45 (quoting *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907)).

⁷¹See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453-66 (1793) (Wilson, J.); see also *United States v. Lee*, 106 U.S. 196, 204-09 (1882).

1794, overruled the decision the prior year in *Chisholm v. Georgia*,⁷² where the Supreme Court had upheld its jurisdiction to entertain a common law action against Georgia by a private individual. *Chisholm* had raised no issue of federal law; federal jurisdiction rested on “diversity of citizenship”, as the plaintiff was a citizen of a state other than Georgia.⁷³ While the Eleventh Amendment clearly overrode the specific result in *Chisholm*, whether it was meant to establish state sovereign immunity has long been debated.⁷⁴ And the amendment’s language, even if viewed as relating to sovereign immunity, is narrower than current doctrine, which extends immunity to suits in state as well as federal courts,⁷⁵ to actions in admiralty as well as in law or equity,⁷⁶ and to actions filed by any plaintiff other than the United States or a sister state.⁷⁷ Nonetheless, the Supreme Court has at once claimed a textual basis for state sovereign

⁷²2 U.S. (2 Dall.) 419 (1793).

⁷³See U.S. CONST., ART. III, § 2 (“The judicial Power shall extend to . . . Controversies . . . between a State and Citizens of another State”).

⁷⁴For leading articles disputing that the Eleventh Amendment recognizes state sovereign immunity, and suggesting that the Amendment merely restricts the exercise of federal jurisdiction against states in actions (like *Chisholm*) not involving federal law, see William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

⁷⁵*Alden v. Maine*, 527 U.S. 706 (1999).

⁷⁶*Ex parte New York*, 256 U.S. 490 (1921).

⁷⁷See, e.g., *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991); *Hans v. Louisiana*, 134 U.S. 1 (1890).

immunity⁷⁸ while dismissing “blind reliance upon the text of the Eleventh Amendment” as ignoring the broader presuppositions on which that text is said to rest.⁷⁹

A pragmatic basis for the prevailing conception, articulated more clearly by commentators than by the Court, rests on concerns that federal court judgments against states might prove unenforceable. *Chisholm* involved a refusal to pay a Revolutionary War debt at a time when “many of the States could have been forced into insolvency but for their immunity from private suits for money damages”⁸⁰ and when the federal government was probably unable to command state obedience to a federal court judgment.⁸¹ Similar concerns about enforceability were salient in nineteenth century decisions alleging that Southern states, whose post-Civil War economies were battered, had violated the federal Constitution’s Contract Clause by failing to make good on bond payments.⁸² Other pragmatic arguments for state immunity have been offered: that damage awards would divert funds from public needs as determined by the states’ political branches,⁸³ and that effective implementation of federal law does not require state

⁷⁸See, e.g., *Alden*, 527 U.S. at 712-13; *Idaho v. Coeur D’Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997); *Welch v. Texas Dept. of Highways & Pub. Transp.*, 483 U.S. 468, 472 (1987).

⁷⁹See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 69 (1996).

⁸⁰*Alden v. Maine*, 527 U.S. 706, 750 (1999); see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821).

⁸¹See John V. Orth, *The Truth About Justice Iredell’s Dissent in Chisholm v. Georgia* (1793), 73 N. C. L. REV. 255, 267-68 (1994).

⁸²See generally JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987).

⁸³See, e.g., *Alden v. Maine*, 527 U.S. 706, 750-51 (1999); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 63-64 (2004).

liability, given the existence of other remedies (including suits by the federal Government, suits against state officials, and Supreme Court review of state court decisions against *consenting* states) when state action violates federal law.⁸⁴

In the end, however, American doctrine can also be viewed as teleological,⁸⁵ but the telos rests on the Court's originalist understanding of the political structure in 1789; the Constitution, though it limited the states' power in many respects, reserved to the states "a residuary and inviolable sovereignty";⁸⁶ "[t]he *preeminent* purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."⁸⁷ Private suits against states for violation of federal law would undermine this foundational understanding, by failing to respect the states' sovereign dignity⁸⁸ and impairing their capacity to govern themselves by political processes rather than judicial decree. Of course, the Supreme Court could have construed the original understanding differently. Indeed, forceful criticisms of the majority's understanding, associated with a different American telos--one stressing federal supremacy, based on popular sovereignty, and the effective enforcement of federal rights--have been offered,

⁸⁴See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n. 14 (1996).

⁸⁵Accord, Pfander, *supra* note 57, at 257.

⁸⁶*Alden v. Maine*, 527 U.S. 706, 715 (1999) (quoting *The Federalist* No. 39, at 245 (James Madison) (C. Rossiter ed. 1961)).

⁸⁷*Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002) (emphasis added); see generally Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1038-41 (2000); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003). See also Halberstam, *supra* note 47, at 795.

⁸⁸*Alden v. Maine*, 527 U.S. 706, 715 (1999).

notably in dissenting opinions in recent Supreme Court decisions, nearly all of which have featured a 5-4 vote.⁸⁹ But dissenting opinions are just that--dissenting.

III. RUMINATIONS ABOUT EUROPEAN AND AMERICAN CONCEPTIONS

A. Paradoxes

That the EC imposes Member State liability more broadly than does the United States seems paradoxical. For the EU is “far narrower and weaker a federation than any extant national federation.”⁹⁰ Daniel Elazar remarked that “the American federation has placed even greater emphasis on the liberty of individuals than on the liberties [of] its constituent polities,” while “[c]onfederations . . . are primarily of polities which place greater emphasis on the liberties of the constituent polities.”⁹¹ Thus, the U.S. Supreme Court has described the relationship of American states to the federal government in terms that even the most ardent Europeanist would not apply to France or Germany: “All the rights of the states as independent nations were surrendered to the United States. The States are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality.”⁹² Nonetheless, the “right” of a Member State to freedom from damages liability imposed by the federal government has been surrendered more fully in the EC than in the United States.

⁸⁹See, e.g., *id.* at 760-98 (Souter, J., dissenting).

⁹⁰See, e.g., Andrew Moravcsik, *Federalism in the European Union: Rhetoric and Reality*, in THE FEDERAL VISION, *supra* note 2, at 161, 163.

⁹¹Daniel J. Elazar, *The United States and the European Union: Models for Their Epochs*, in THE FEDERAL VISION, *supra* note 2, at 31, 51.

⁹²*New Hampshire v. Louisiana*, 108 U.S. 76, 90 (1883).

If these broad conceptions seem more consistent with state liability in the United States than in Europe, so, too, do key legal doctrines on which such liability would rest. The EC doctrines of direct effect and supremacy were considerable innovations, especially viewing the EC through the lens of international law. By contrast, the American Constitution clearly prescribes that federal law is supreme and has “direct effect” in the states.⁹³ Finally, it was clearly within the contemplation of the founders that a federal Supreme Court would have the power to review the judgments of the courts of the states.

An additional paradox emerges from the premise that courts may feel on sounder ground in recognizing novel or intrusive remedies when the legislature has taken the first step.⁹⁴ In the EC, no secondary legislation confers a general right upon private actors to sue Member States for violation of European law, nor are there numerous specific statutes purporting to impose state liability in particular subject matter areas.⁹⁵ State liability is entirely a judicial creation, and the

⁹³See U.S. Const., Article VI, cl. 2 (“The Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . .”). The Supreme Court has in a limited respect distinguished the obligations imposed by the Supremacy Clause on state judges from those imposed on state legislative or executive officials: the latter, unlike the former, cannot be “commandeered” by federal legislation to take specified action. See *Printz v. United States*, 521 U.S. 898 (1997). But this restriction on an extraordinarily rare congressional technique, see *id.* at 907-09, 916-18, should not obscure the more fundamental point.

⁹⁴But *cf.* Smith, *supra* note 24, at 289 (explaining the absence of EC legislation on remedies for violation of EC law as appealing to Member State sensitivities about the autonomy of their legal systems).

⁹⁵Under the governing treaties, of the various functions of the ECJ--to keep EC institutions within their bounds, to interpret EC law, and to ensure Member State compliance with EC law--“the original European legal system was intentionally weakest precisely in [the last of these areas].” SEE ALTER, *supra* note 4, at 5. Compare OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920) (“I do not think the United States would come to an

ECJ has rejected the view that only legislation could create a right to reparation.⁹⁶ (Indeed, in the 1970s, a proposal that the Treaty be amended to impose member state liability was offered by the ECJ but never adopted; *Francovich* was the ECJ's answer.⁹⁷) In the U.S., by contrast, numerous enactments authorize private suit to enforce federal rights violated by state official action--notably 42 U.S.C. § 1983. (While section 1983 actions must name state officials rather than the states themselves, that interpretation is premised on the existence of state sovereign immunity rather than bearing independently on its appropriateness.⁹⁸) Moreover, Congress has sought in numerous specific statutes--ranging from the regulation of fair labor standards to the protection of patents and copyrights to manifold prohibitions on discrimination in employment and elsewhere--to authorize damages liability against the states themselves.⁹⁹ Thus, the Supreme Court has not merely refused to impose state liability; it has held unconstitutional numerous congressional enactments seeking to embrace that principle.

The doctrinal disparity appears paradoxical for still another reason. State liability in the

end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.”).

⁹⁶Joined Cases C-46/93 & 48/93, *Brasserie du Pêcheur SA v. Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others*, [1996] ERC I-1029, Paragraph 27. See generally CRAIG & DE BÚRCA, *supra* note 24, at 272; de Witte, *Direct Effect*, *supra* note 4, at 191-92.

⁹⁷See TREVOR C. HARTLEY, *EUROPEAN UNION LAW IN A GLOBAL CONTEXT: TEXT, CASES AND MATERIALS* 207 (2004).

⁹⁸See *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (holding that neither a state nor a state official acting in an official capacity is a “person” within the meaning of § 1983 when sued for retrospective relief); *Quern v. Jordan*, 440 U.S. 332 (1979) (holding that § 1983 did not purport to override state immunity).

⁹⁹For some of the leading measures, see Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 47-48.

United States would have been enforced primarily in federal trial courts with uniform procedures and imposed upon states sharing the same legal traditions. By contrast, the *Francovich* principle has had to be integrated into national legal systems which vary significantly in their lines between public and private functions, systems of administrative law, roles assigned to damages actions as a means of enforcing the law, and cultural and political understandings. Fear that state liability might impair the coherence of disparate traditions of Member States should have been more salient in the EC.¹⁰⁰

A final paradox emerges from the kinds of rights characteristically at issue in the two polities. Federal law in the United States protects a broad set of personal, political and civil rights--rights of human dignity and fundamental freedom--against infringement by state action. These include a broad set of constitutional rights--to equal protection, due process, freedom of speech and religion, fair criminal trials, and fundamental liberties relating intimate relations and reproductive freedom--as well as statutory rights to freedom from discrimination on the basis of race, religion, gender, nationality, and disability in numerous domains (housing, public accommodations, employment, and participation in federally-funded programs). While protection of fundamental rights has become more robust in the EC--both because of secondary legislation and because of the adoption of a Charter of Fundamental Rights¹⁰¹--nonetheless the EC's core rights are economic ones--freedom of movement of persons, goods, services, and

¹⁰⁰See Harlow, *supra* note 11, at 221-22. For a summary of a range of views counseling hesitation on these grounds, see DOUGAN, *supra* note 24, at 105-10.

¹⁰¹See CRAIG & DE BÚRCA, *supra* note 24, at 317-96, 842-935.

capital--asserted primarily by commercial enterprises.¹⁰² In general, regimes of governmental liability give greater protection to guarantees of liberty and physical integrity than to economic interests,¹⁰³ but here the opposite pattern appears.

B. Explanations

How might one explain the foregoing paradoxes? I have no single answer but a set of explanations along a broad variety of dimensions.

1. The Importance of Facts

American lawyers are trained to believe that legal doctrines respond to the factual circumstances,¹⁰⁴ and thus the circumstances underlying the key moments in doctrinal developments warrant close inspection. The foundational moment for the United States was not so much the decision in *Chisholm*, refusing to recognize state immunity, but the political reaction against that decision, leading to adoption of the Eleventh Amendment. It may have been easier to fuel a broad political reaction against state liability when no state was defying *federal* law and the Court's abortive recognition of liability threatened state insolvency and defiance.

The foundational decision in the EU, in *Francovich*, fueled no such political reaction, but the facts hardly placed Italy in an attractive light. The first line of the Advocate General's Opinion reads: "Rarely has the Court been called upon to decide a case in which the adverse

¹⁰²See Harlow, *supra* note 11, at 205, 211.

¹⁰³See ANTHONY W. BRADLEY & JOHN BELL, *Governmental Liability: A Preliminary Assessment*, in GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY 1, 3 (JOHN BELL & ANTHONY W. BRADLEY eds., 1991).

¹⁰⁴For a classic statement, see Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1005 (1924) ("Facts and facts again are decisive.").

consequences for the individuals concerned of failure to implement a directive were as shocking as in the case now before us.”¹⁰⁵ Italy’s broader situation was equally unsympathetic: its record of transposing directives was particularly poor,¹⁰⁶ and the ECJ had already held that it was in violation for failing to transpose the directive in question.¹⁰⁷ Persistent and widespread non-compliance with the law of the union may stimulate a more potent judicial response to address the defiance--a tendency also visible in American law¹⁰⁸-- while providing less fuel for a polity-wide political reaction, especially when other Member States had better compliance records and thus may have seen themselves as benefiting from more robust community-wide enforcement.

2. History (Or, If One Wants To Be Fancy, Path-Dependence)

The United States was formed nearly 170 years earlier than the EC, and *Chisholm* and the reaction against it predated *Francovich* by nearly two centuries. As Professor Goldstein puts it, “America of the late eighteenth and early nineteenth century was simply a more ‘wild and woolly’ society, one where--as compared to late twentieth century Euro-America--bureaucracy was less routinized and the populace was less respectful of authority in general.”¹⁰⁹ A legal culture hospitable to rights and their private enforcement and to state liability is more familiar in the 20th than the 18th century. Thus, American doctrine may have been shaped by conceptions

¹⁰⁵Opinion of Advocate General Mischo in *Francovich*, Paragraph 1.

¹⁰⁶See Harlow, *supra* note 11, at 207.

¹⁰⁷Case 22/87, *Commission v. Italy*, [1989] ECR 143; see Harlow, *supra* note 11, at 201-02.

¹⁰⁸See note 34, *supra*.

¹⁰⁹LESLIE FRIEDMAN GOLDSTEIN, *CONSTITUTING FEDERAL SOVEREIGNTY: THE EUROPEAN UNION IN COMPARATIVE CONTEXT* 49 (2001).

that were outmoded when the EC came into maturity (and that carry less potency in the United States today);¹¹⁰ had the Supreme Court first recognized state liability in 1991 instead of 1793, perhaps the decision would have met public acceptance rather than constitutional override.

Moreover, when *Chisholm* was decided the American polity had much work to do in order to earn the allegiance of the Member States and their adherence to federal authority.¹¹¹ Between 1789 and 1860, there were “intermittent but fierce” episodes of political resistance, “almost annually”, “resistance so intense that federal authority in practice sometimes had to give way”;¹¹² even the seemingly clear-cut power of the Supreme Court to review state court judgments was challenged by courts in seven states,¹¹³ and the Court was “a weak and vulnerable institution, with the reach of its authority in doubt.”¹¹⁴ By contrast, the thirty-four years that passed between the Treaty of Rome and *Francovich* saw a level of legislative activity from Brussels that dwarfed that of the early years of the American republic, including “modern” forms of government action that could not be policed simply by defending against official intrusion but which called for affirmative remediation to ensure adequate implementation. None

¹¹⁰Sovereign immunity has been attacked as unfair, see, e.g.,; Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383 (1969); Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L. J. 543, 547-58 & sources cited (2003), and has eroded as both the federal government, see HART & WECHSLER, *supra* note 37, at 960-72, and the states, see Robel, *supra*, have broadly waived immunity.

¹¹¹See generally GOLDSTEIN, *supra* note 109.

¹¹²See *id.* at 23, 32.

¹¹³See HART & WECHSLER, *supra* note 37, at 479.

¹¹⁴RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW 190 (2004).

of this is to say that European integration and EC regulation provoked no resistance or that the European polity in 1991 was without its frailties.¹¹⁵ Still, when the question of state liability was joined in Europe, the polity was more securely established than was the United States in 1793-94.

While federal polities that are extraordinarily fragile may hesitate to impose liabilities that will prove unenforceable, as a federal system gains acceptance and power, its courts, once embarked on a mission that it views as of cardinal importance, may find it necessary to embrace forceful procedural and remedial doctrines to ensure success. American school desegregation litigation illustrates that point: the initial caution of “with all deliberate speed”¹¹⁶ was followed in the 1960s, after desegregation gained the support of the federal political branches,¹¹⁷ by a series of bold decisions seeking to advance the mission.¹¹⁸ In the EC, by the time *Francovich*

¹¹⁵See generally Gráinne de Búrca, *The Drafting of a Constitution for the European Union: Europe’s Madisonian Moment or a Moment of Madness?*, 61 WASH. & LEE L. REV. 555, 561 (2004); see also Andrew Moravcsik, *In Defence of the ‘Democracy Deficit’: Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUD. 603, 606-10 (2002) (stressing the weaknesses of the European Community).

¹¹⁶*Brown v. Board of Education (II)*, 349 U.S. 294, 301 (1955).

¹¹⁷See FALLON, *supra* note 114, at 120; GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 74-78, 94-96 (1991) (comparing the Court's hesitance in the decade after *Brown*, when it lacked the support of the political branches, to its reengagement after 1964, when it enjoyed their support); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10, 13-71 (1994) (discussing the many factors, including the support of the political branches, that made *Brown* “judicially conceivable”).

¹¹⁸See, e.g., *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964) (prohibiting a county from closing public schools and from financing schooling at all-white private schools); *Green v. County School Bd.*, 391 U.S. 430 (1968) (invalidating a county’s “freedom of choice” plan that perpetuated segregation); *Swann v. Charlotte-*

was decided, the ECJ's integrationist impulses had found important reinforcement in the Single European Act of 1986 (SEA), which sought by 1992 to complete creation of an internal market through an ambitious legislative program made possible by the departure from unanimous voting rules.¹¹⁹ Judicially-led integration was now reinforced after 1986 by legislative initiative,¹²⁰ but the accelerating pace of legislation generated an "increasingly cavalier attitude of certain states to their obligations to implement Community law, the number of formal notices sent out by the European Commission to Member States rising from sixty in 1975 to 960 in 1990."¹²¹ Two particularly troublesome forms of non-compliance were disregard of ECJ judgments and the failure to transpose directives adequately or, in some cases, at all.¹²² Both were involved in

Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (affirming the district court's busing order to promote desegregation). See also *Griffin v. County School Board of Prince Edward County*, 363 F.2d 206 (4th Cir. 1966) (upholding a contempt citation against a school board that disbursed public funds to private segregated schools, despite the absence of a court order prohibiting that action, on the basis that the board's right to so act was under consideration by the court).

School desegregation cases did not, however, generate pressure on state sovereign immunity doctrine, as most sought only injunctive decrees rather than damages and nearly all of those involving elementary and secondary education named local governments, which do share the states' immunity.

¹¹⁹See Article 8a EEC (as in effect 1987, now Art. 14 EC), as modified by Article 13 Single European Act, June 29, 1987, O.J. (L 169) 7 (1987) ("The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992. . . .")

¹²⁰See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403, 2456-72 (1991).

¹²¹Smith, *supra* note 24, at 303.

¹²²See Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 MOD. L. REV. 19, 23, 40 (1993); Jean Paul Jacqué & Joseph H.H. Weiler, *On the Road to European Union--A New Judicial Architecture: An Agenda for the Intergovernmental Conference*, 27 COMMON MKT. L. REV. 185, 191 (1990).

Francovich.

Thus, after 1986, Member State resistance confronted an ECJ now standing shoulder to shoulder with the EC's political organs. *Francovich* was decided just one year before the deadline for completing the internal market, and as "it became increasingly clear to political and judicial actors alike that reliance on traditional means of enforcement . . . [was] inefficient."¹²³ Having long taken the lead in promoting integration, the ECJ may have been emboldened by the flurry of legislative action to help the EC reach the finish line. In that context, anticipated resistance to the imposition of state liability may well have seemed surmountable.

The historical comparison of *Francovich* to *Chisholm* and its overruling does not fully explain why the Supreme Court, two centuries after *Chisholm*, not only resisted numerous calls to limit state sovereign immunity but indeed extended its reach--definitively ruling that Congress lacks a general power to override immunity,¹²⁴ and that, notwithstanding the Eleventh Amendment's language regulating the scope of *federal* judicial power, state sovereign immunity is a constitutional doctrine which a state may invoke in its own courts to resist enforcement of federal rights.¹²⁵ Neither proposition was a foregone conclusion, and while precedent supplied a major prop in the majority's reasoning, four dissenting Justices found that and other considerations proffered to be unconvincing. But if the events of 1793-94 hardly precluded a future change of direction, they did determine the initial path of development.

3. Common Law Versus Civil Law Traditions

¹²³Tridimas, *supra* note 24, at 150.

¹²⁴See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (5-4).

¹²⁵See *Alden v. Maine*, 527 U.S. 706 (1999) (5-4).

Another possible explanation for the divergent paths lies in the fact that only two EC Member States are, like the United States, common law countries. The common law tradition relies heavily on suits against officials for both specific and damages relief, while recognizing the sovereign's immunity.¹²⁶ In civil law systems, a general principle of state liability (either civil or administrative) is more prevalent.¹²⁷ To be sure, such liability is often limited in a variety of respects;¹²⁸ indeed, *Francovich* was dramatic in part because it required Member States to recognize state liability in damages even when national law would not have afforded that remedy.¹²⁹ Nonetheless, the stronger roots of governmental liability in civil law nations

¹²⁶See, e.g., Jaffe, *supra* note 33. In the UK, the source of this tradition, the contemporary rules on public liability are more complex, but the insistence that public authorities are not liable merely because of illegal, invalid, or ultra vires action, and that a successful action must assert a private rather than public right, preserves an important element of the tradition of immunity. See, e.g., Merris Amos, *Eurotorts and Unicorns: Damages for Breach of Community Law in the United Kingdom*, in TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE 109, 110-11 (Duncan Fairgrieve, Mads Andenas & John Bell eds., 2002).

¹²⁷See, e.g., DAVID A.O. EDWARD & ROBERT C. LANE, EUROPEAN COMMUNITY LAW: AN INTRODUCTION 59 (2d ed. 1995).

¹²⁸See Michael Dougan, *The Francovich Right to Reparation: Reshaping the Contours of Community Remedial Competence*, 6 EURO. PUB. L. 103, 105 (2000).

¹²⁹See, e.g., van Gerven, *supra* note 44, at 136-37.

Prior to *Francovich*, the ECJ had stated that an action invoking EC law in a national court generally was governed by that court's jurisdictional, procedural, and remedial rules, so long as those rules did not discriminate against the enforcement of EC law or make exercise of EC rights virtually impossible in practice. See Case 158/80, *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v. Hauptzollamt Kiel*, [1981] ECR 1805. But as Advocate General Léger observed in Case 5/94, *R. v. Ministry of Agriculture, Fisheries, and Food (MAFF)*, ex parte *Hedley Lomas Ltd.*, [1996] ECR I-2553, ECJ case law, resting on the principle of cooperation in Article 10 (ex article 5), developed an increasing extensive minimum standard of protection for individuals relying on Community law, requiring that national remedies for breach of EC law be effective and that particular remedies not recognized in national law be afforded, see, e.g., Case

may have made its acceptance more natural in the EC than in the United States.¹³⁰

The civil law/common law divide takes on greater significance in light of the point, noted above,¹³¹ that Europe, like the United States, has drawn on the doctrines governing the liability of federal institutions in shaping the liability of Member States. Article 288 (ex Article 215) provides that the non-contractual liability of Community institutions shall be shaped “in accordance with the general principles common to the laws of the Member States.” That approach “seems intended to legitimate the development of the principle of state liability, so that it is seen to derive from well-established principles of national legal orders rather than from the imagination of the ECJ.”¹³² In the U.S., state sovereign immunity doctrine draws instead upon the law governing liability of the United States--which, absent its consent, remains immune from

C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd. and Others*, [1990] ECR I-2433 (requiring the United Kingdom to provide interim relief against the Crown in a situation in which domestic law did not make that remedy available). See generally Smith, *supra* note 24.

Still, what made *Francovich* particularly dramatic was its requirement that Member States recognize state liability even when such liability was incompatible with basic assumptions of their legal systems. See CRAIG & DE BÚRCA, *supra* note 24, at 257. For given that the bar on discrimination already required Member States to make available, for violations of EC law, any remedy available for violations of national law, it was precisely when a Member State’s national law did *not* recognize state liability that *Francovich* had bite.

¹³⁰Professor Pfander argues that the differences are not stark, pointing to the prevalence of state waiver of sovereign immunity in state court actions asserting violations of *state* law. See Pfander, *supra* note 57, at 260. However, the conception of governmental immunity as a constitutional principle, one that a government must waive by act of its own legislature, is a distinctive aspect of American law not replicated throughout European legal systems.

¹³¹See Section I(A), *supra*.

¹³²See CRAIG & DE BÚRCA, *supra* note 24, at 262. See generally Koen Lenaerts, *Interlocking Legal Orders in the European Union and Comparative Law*, 52 INT’L & COMP. L. Q. 873 (2003) (viewing state liability as a key example of how European decisions draw on legal principles of the Member States).

suit.

4. The Structure of Enforcement

The need for a particular legal remedy cannot be determined in isolation from other aspects of the legal and political system. Apart from state liability doctrine, the American procedural system for enforcing federal law is substantially more robust than the European system. First, the United States has a system of lower federal courts with jurisdiction to entertain private actions seeking to enforce federal law against state officials. Federal judges, although not unconcerned about legitimate state interests, are loyal primarily to the federal government,¹³³ and their life tenure and salary protection confers political independence.¹³⁴ The federal courts have broad remedial authority and they follow federal procedures that are unlikely to interpose significant barriers to the vindication of federal rights; indeed, a number of federal statutes affirmatively encourage such vindication by authorizing one-way shifting of attorney's fees in actions to enforce federal rights (prevailing plaintiffs obtain attorney's fees in addition to the relief awarded, while defeated plaintiffs are not obliged to pay their opponents' fees).¹³⁵

Despite broad federal question jurisdiction, in practice federal rights are often litigated in

¹³³See Paul J. Mishkin, *The "Federal Question" in the District Courts*, 53 COLUM. L. REV. 157, 158-59, 175-76, 184-85, 195-96 (1953).

¹³⁴See U.S. CONST., ART. III, SEC. 1.

¹³⁵See, e.g., 42 U.S.C. § 1988 (2000). Cf. Thomas de la Mare, *Article 177 in Social and Political Context*, in THE EVOLUTION OF EU LAW, *supra* note 1, at 215, 234 (noting, as one factor for the large number of references from Germany to the ECJ, the "high levels of cheap or subsidized domestic litigation by private individuals").

American state courts.¹³⁶ But then a second element of American robustness becomes pertinent--the Supreme Court's power to review state court judgments. Disappointed litigants may seek Supreme Court review without obtaining state court permission; not only can the Supreme Court, if it grants review, express its view of a legal issue, but it can reverse a state court judgment or even, in rare cases, order the state court to enter a particular judgment.¹³⁷ Thus, state judges know that a failure to respect federal law creates at least the possibility of review and reversal.

But if the scope of the Supreme Court's power is clear, so are the limits of its resources. In the 2003 Term, of 80 cases decided by full opinion, only 9 originated in the state courts;¹³⁸ since 1970, the Court has not decided by full opinion more than 167 cases a Term; cases originating in the state courts have not exceeded 30% of those decisions (and peaked at 44 in total).¹³⁹

Still, the American system looks robust compared to that of the EC. The EC lacks a

¹³⁶State courts ordinarily have original concurrent jurisdiction over claims based on federal law and original exclusive jurisdiction over federal issues that arise by way of defense or counterclaim to a state law cause of action. See *Holmes Group, Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826 (2002); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

¹³⁷See generally HART & WECHSLER, *supra* note 37, at 481-83.

¹³⁸*The Supreme Court, 2003 Term--The Statistics*, 118 HARV. L. REV. 497, 507 tbl. III (2004). Of an additional 46 cases decided by memorandum opinion, 15 originated in the state courts. *Id.* at 506 tbl. II(E).

¹³⁹The annual statistical compilations in the *Harvard Law Review* indicate that since 1970, the 1981 Term was the peak for total decisions by full opinion, see *The Supreme Court, 1981 Term--The Statistics*, 96 HARV. L. REV. 304, 309 tbl. III (1982); the 1986 Term was the peak for the number of decisions originating in state court (44 of 152), see *The Supreme Court, 1986 Term--The Statistics*, 101 HARV. L. REV. 362, 367 tbl. III (1987); and the 1989 Term featured the highest percentage (41 of 137, or 30%) of decisions originating in the state courts, see *The Supreme Court, 1989 Term--The Statistics*, 104 HARV. L. REV. 359, 364 tbl. III (1990).

system of lower “federal” courts, and an action by a private party seeking to enforce EC law against the Member States may not be filed initially before the Court of First Instance¹⁴⁰ but instead only in national courts.¹⁴¹ While EC law requires those courts to provide effective remedies, knowledgeable observers have noted that the barriers to effective enforcement of EC law can be substantial.¹⁴²

The ECJ’s superintendence of national courts is quite attenuated. To be sure, under Article 234 (ex 177), which permits interlocutory review of a question of European law, the ECJ decides far more than 9, or even 44, cases referred from national courts.¹⁴³ But this preliminary reference procedure supplies the only “federal” enforcement available to private parties. In part for that reason, the ECJ has its own capacity problems, with a backlog of roughly two years.¹⁴⁴ Moreover, review under Article 234 requires a reference from a national court. Although EC

¹⁴⁰A proposal to permit private parties to bring suit against Member States in the ECJ was rejected in negotiations leading to the SEA. Martin Shapiro, *The European Court of Justice*, in *EUROPOLITICS: INSTITUTIONS AND POLICYMAKING IN THE “NEW” EUROPEAN COMMUNITY* 126-27 (Alberta Sbragia ed., 1992).

¹⁴¹See generally CRAIG & DE BÚRCA, *supra* note 24, at 86-93. As amended by the Treaty of Nice, Article 225(1) now permits the CFI to issue preliminary rulings in some cases initiated in national courts.

¹⁴²See, e.g., Opinion of AG Jacobs, Case C-263/02, *Commission of the European Communities v Jégo-Quére & Cie SA*, 2003 WL 101341 (2003), Paragraphs 44-47; Smith, *supra* note 24; STEPHEN WEATHERILL, *CASES AND MATERIALS ON EU LAW* 133 (6th ed. 2003); P.J.G. KATPEYN & P. VERLOREN VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 557-59 (3d ed. 1998).

¹⁴³See, e.g., JOHN MCCORMICK, *THE EUROPEAN UNION: POLITICS AND POLICIES* 114 (2d ed., 1999).

¹⁴⁴See Peter J. Wattel, Köbler, CILFIT and Welthgrove: *We Can’t Go On Meeting Like This*, 41 COMMON. MKT. L. REV. 177, 179 (2004).

law obliges national courts of last instance to refer “unless it has been established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt,”¹⁴⁵ violations of that obligation are thought to be reasonably common¹⁴⁶ and cannot be reviewed, no matter how serious. Moreover, under Article 234 the ECJ decides issues of European law rather than rendering judgment (although some decisions effectively tell a national court how it must decide).¹⁴⁷ Thus, the EC judicial system is triply dependent upon the national courts--first, to provide a hospitable forum for private actions premised on violations of EC law; second, to refer issues of European law to the ECJ; and third, to carry out the fair implications of ECJ decisions.

Both Europe and the United States also authorize public enforcement of federal law

¹⁴⁵Case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health, [1982] ECR 3415, Paragraph 21.

¹⁴⁶For statistics suggesting only about one quarter of cases involving EC law are referred, see studies cited by ALTER, *supra* note 4, at 34. See also *id* at 51; *id* at 61 (discussing reluctance of British judges to refer); 129 (discussing paucity of referrals from French Conseil D’Etat).

The Annual Reports on Monitoring the Application of Community Law, Annex VI, indicate that the number of references per Member State varies enormously, and the variance is not explained entirely by differences in country size. Those reports also identify quite a few cases in which no request for a preliminary reference was made, although they involved a point of Community law that was “less than perfectly obvious”. The Reports can be found at http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

¹⁴⁷See G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595, 606 (1989); Craig, *supra* note 20, at 86 (noting that the ECJ has in several cases come close to resolving all of the critical issues).

against Member States. Although in the United States it is far less significant than private enforcement,¹⁴⁸ public enforcement nonetheless may be more robust in the U.S. than in Europe, for at least two reasons. First, the U.S. federal government dwarfs that of the EU with respect to both employees and budget. The U.S. budget is about 20% of US GDP; the EU's budget is capped at 1.24% of the EU's GDI, in practice is closer to 1%, and represents only 2.5% of public spending in the EU.¹⁴⁹ The EU, lacking an investigative staff, must rely on complaints based on information generated elsewhere.¹⁵⁰ Second, the remedies available to public enforcers are more limited in the EC than in the U.S. When *Francovich* was decided, in actions by the Commission against a Member State, the ECJ could issue only a declaration of violation; even today, after augmentation of the Court's authority, coercive remedies may be imposed only after a prior declaration of invalidity and according to a process designed to foster negotiated outcomes.¹⁵¹ Moreover, the Member States' direct participation in the legislative process, through their representatives in the EC's most important legislative body, the Council, as well as their (admittedly more muted) influence in the Commission, may cause the Commission to hesitate

¹⁴⁸On the United States, see William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 36 (1975); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1404, 1409 (2000); Meltzer, *supra* note 87, at 1021-22 & n. 50.

¹⁴⁹Compare Iain Begg, *Funding the European Union*, March 2005, published by The Federal Trust, http://www.fedtrust.co.uk/admin/uploads/FedT_Begg_EUBudget.pdf, at 5 (accessed 4/28/05) with 2004 ECONOMIC REPORT OF THE PRESIDENT 378, table B-79 (US federal outlays are 20% of GDP).

¹⁵⁰CRAIG & DE BÚRCA, *supra* note 24, at 398.

¹⁵¹Article 228 (ex 171). See ALTER, *supra* note 4, at 8 & n.9.

before seeking coercive remedies.¹⁵²

A final comparison of the enforcement powers of the center derives from the spending figures noted above. The U.S. government, which dispenses large sums to state governments,¹⁵³ can require recipients, as a condition of receiving funds, to comply with federal programmatic requirements. One condition Congress may prescribe is that recipient states waive sovereign immunity (although that requirement is not imposed routinely and the congressional power is subject to some, if uncertain, limits).¹⁵⁴ Perhaps more important, even if waivers of immunity and funds cut-offs are both rare, the spending mechanism induces states to participate in federal-state programs and to implement federal mandates; if some friction remains, the funding nonetheless supplies an important if incomplete lubricant.

In the EC, partly due to budgetary limits, the principal form of action is administrative

¹⁵²See P.P. Craig, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, 12 OXFORD J. LEG. STUD. 453, 456 (1992); Deirdre Curtin, *Directives: The Effectiveness of Judicial Protection of Individual Rights*, 27 COMMON MKT. L. REV. 709, 710 (1990). To be sure, in *Alden v. Maine*, 527 U.S. 706, 756 (1999), the Supreme Court noted that federal enforcement requires an “exercise of political responsibility” absent in private actions. But Member State influence is likely to be looser over American federal than European officials. Officials of EC Member States sit in the Council of Ministers, which shares authority in complex ways with the European Commission, the body empowered to initiate “federal” action against a non-compliant state. See generally CRAIG & DE BÚRCA, *supra* note 24, at 161-75. In the United States, members of Congress, though elected in the states, are not representatives of the states as such, and our conception of separation of powers does not feature institutions, like those of the EC, that mix Member State representatives with executive officials.

¹⁵³See Statistical Abstract of the United States, 2004-05, 314 Table 472 (in 2002, the United States made grants of more than \$400 billion).

¹⁵⁴See generally Meltzer, *supra* note 34; Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (And How Not To)*, 79 TEX. L. REV. 1037 (2001).

regulation.¹⁵⁵ And while some EC regulation of the states--for example, Treaty provisions relating to freedom of movement--resembles in form American direct regulation of state governmental operations, much EC regulation takes the form of directives that require Member States to regulate third parties by transposing directives into national law.¹⁵⁶ The EC consequently relies heavily on unconditional mandates of state cooperation of a form that, in the United States, would be viewed as prohibited “commandeering”. Unable to offer the carrot of “federal” funds, the stick of federal funds cut-offs, or any credible threat to administer federal programs without state participation, the EC may have seen state liability as a necessary remedy to pressure Member States to carry out their obligations not simply to comply with federal duties but affirmatively to implement federal law. In the United States, by contrast, for constitutional as well as historical reasons, violations of the form found in *Francovich* (state failure to legislate consistently with an *unconditional* federal mandate) are simply not at issue.

What is the import of all of these differences? The U.S., even without imposing state liability, affords a significant remedial system based on private suits against state officials, to a lesser extent, on federal enforcement, and on conditional spending programs. Indeed, the Supreme Court has declared that in view of these alternatives, recognition of state sovereign immunity leaves adequate mechanisms for the enforcement of federal law against state action.¹⁵⁷

¹⁵⁵See Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J. PUB. POL’Y 139, 144, 150 (1997).

¹⁵⁶See David Lazer & Viktor Mayer-Schoenberger, *Blueprints for Change: Devolution and Subsidiarity in the United States and the European Union*, in THE FEDERAL VISION, *supra* note 2, at 118.

¹⁵⁷See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n. 14 (1996).

One can fairly argue about whether the glass in the United States is half-full or half-empty,¹⁵⁸ but no one doubts that the alternative remedies in the United States remain significant. In the EC, recognition of state liability was more necessary to ensure compliance by Member States, as the glass of other remedies for violation of European law is far less full than in the United States.¹⁵⁹ And recognition of state liability may have had the desired effect in the EC, as the rate at which directives were transposed by Member States “steadily increased from below 90 percent in 1990 [the year before the *Francovich* decision] to a record 95.7 per cent in 1998.”¹⁶⁰

The EC’s dependence upon national courts may have made recognition of state liability not only more necessary but also more palatable. In the American context, before 1999 it was unclear whether states, when sued on federal claims, enjoyed sovereign immunity not only in federal court but also in their own courts. Some suggested that providing state governments with immunity in federal courts but not in their own courts could be viewed as striking a desirable balance: the state courts would have factfinding responsibilities, could assign appropriate weight to state and local interests, and could participate in developing federal law.¹⁶¹ In the end, the Supreme Court extended immunity to suit in state court as well.¹⁶² But in the EC, concern that state liability would get out of hand may have been limited because that liability would be

¹⁵⁸See Meltzer, *supra* note 34; Berman, Reese & Young, *supra* note 154.

¹⁵⁹See generally Bell & Bradley, *supra* note 103, at 10-11.

¹⁶⁰See Lazer & Mayer-Schoenberger, *supra* note 156, at 140.

¹⁶¹See Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L. J. 1, 99-101 (1988).

¹⁶²*Alden v. Maine*, 527 U.S. 706 (1999).

enforced exclusively in national courts. (That in Europe, damage awards tend to be lower than in the U.S., in part because of the absence of lay juries, and court costs often are higher, would also make state liability seem less threatening.)

I suggested earlier that a fragile polity--the United States of the 1790s--may hesitate to impose dramatic judicial remedies upon Member States. Here, however, I am suggesting that the strength of a polity--as measured by the availability of remedies other than state liability, for the enforcement of federal law--may also lead to hesitation. The EC of 1991 may have fallen between these poles--powerful enough successfully to impose state liability, weak enough (in its other mechanisms for the enforcement of federal law) that such liability was deemed necessary.

5. Judicial Politics

While federal systems tend to consolidate power in the center,¹⁶³ short-term movements in the opposite direction may punctuate that trend, and “the rhythms of federalism will be most pronounced where democratic influence is stronger.”¹⁶⁴ In the U.S., strong democratic influence over American judicial appointments may generate strong judicial rhythms, as ideologically driven appointments are accepted in practice and often in principle. Republican Presidents have filled 10 of the 12 Supreme Court vacancies since 1969, and while the nominees’ expected views on issues of federalism may not have figured importantly in judicial selections,¹⁶⁵ Justices

¹⁶³See Weiler, *Europe’s Sonderweg*, *supra* note 3, at 55.

¹⁶⁴John D. Donahue & Mark A. Pollack, *Centralization and Its Discontents: The Rhythms of Federalism in the United States and the European Union*, in *THE FEDERAL VISION*, *supra* note 2, at 73, 117.

¹⁶⁵See, e.g., HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 292-339 (2d. ed. 1985) (discussing President Nixon’s

chosen for their “conservative” views on one set of issues (criminal procedure, or abortion rights) tend to share concerns about expanding national authority and state perceptions of diminishing autonomy.¹⁶⁶ Thus, the Supreme Court in the past decade has invalidated two federal statutes (one pointless,¹⁶⁷ the other of greater significance¹⁶⁸) as beyond national legislative authority, and two others on the distinct ground that they unconstitutionally “commandeer” state legislatures to enact legislation¹⁶⁹ or state executive officials to administer federal law.¹⁷⁰ But few expect the Court seriously to restrict federal legislative competence, and the “commandeering” technique has been so rare in American practice that its prohibition may lack great importance.¹⁷¹

appointment of Chief Justice Burger and Justices Blackmun, Powell and Rehnquist).

¹⁶⁶See Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 451 (2002). The correlation is hardly perfect, and statutory preemption cases are an important counterexample. See Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 369-70 (noting that the Justices most (least) protective of state autonomy in constitutional federalism cases are those most (least) inclined to vote for statutory preemption of state authority).

¹⁶⁷See *Lopez v. United States*, 514 U.S. 549 (1995) (invalidating the federal Gun Free School Zones Act as outside the federal power to regulate interstate commerce). Commentators of quite different general perspectives agreed that *Lopez* was of limited significance. See, e.g., Charles Fried, *The Supreme Court, 1994 Term--Foreword: Revolutions?*, 109 HARV. L. REV. 13, 34-45 (1995); Louis H. Pollak, *Foreword*, 94 MICH. L. REV. 533, 552 (1995).

¹⁶⁸See *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating provisions of the Violence Against Women Act permitting victims of gender-based violence to bring a civil damages action).

¹⁶⁹*New York v. United States*, 505 U.S. 144 (1992).

¹⁷⁰*Printz v. United States*, 521 U.S. 898 (1997).

¹⁷¹Thus, in *Printz*, the majority spoke of “almost two centuries of apparent congressional avoidance of the practice.” 521 U.S. at 918.

Insofar as the Court sought a more general limit on federal power, sovereign immunity had appealing features: an historical pedigree and a doctrine that, while full of oddities, has a lawlike quality that judges may feel comfortable enforcing against legislatures.¹⁷² By contrast, many other suggested limits on national legislative power--*e.g.*, a demonstrated need for action at the federal level, similar to the European notion of subsidiarity¹⁷³--involve open-ended legal standards that confer enormous judicial discretion in application; Justice Scalia is a prominent and extreme critic of such standards,¹⁷⁴ but his position finds roots in more broadly shared understandings.¹⁷⁵ To be sure, many commentators sympathetic to limiting national power regard state sovereign immunity as a peculiar means to that end.¹⁷⁶ But perhaps a Supreme Court concerned about state autonomy thought it had to do *something* of general applicability.¹⁷⁷

¹⁷²See Meltzer, *supra* note 99, at 65.

¹⁷³See, *e.g.*, Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995).

¹⁷⁴Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

¹⁷⁵See, *e.g.*, Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943 (1987); Kathleen M. Sullivan, *The Supreme Court, 1991 Term--Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

By contrast, the ECJ, like many European courts, is comfortable enforcing principles (for example, the principle of proportionality), see, *e.g.*, NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 198-210 (2003), that would strike many American lawyers as remarkably open-ended. See Shapiro, *supra* note 140, at 130-31.

¹⁷⁶See CHARLES FRIED, *SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT* 35-39, 48 (2004); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1.

¹⁷⁷See, *e.g.*, Meltzer, *supra* note 99, at 61-65.

In the EC, by contrast, the ECJ was committed to European political integration,¹⁷⁸ in which it had taken the lead during a period of institutional malaise and inaction by other EC organs.¹⁷⁹ ECJ judges, because of “the fragility of the democratic structure” of the EC, at least early on, “became accustomed to operating in a political vacuum, secure from institutional competition and largely insulated from political opinion” and within “[a] tight epistemic community of court, legal services and commentators.”¹⁸⁰ Democratic influence over judicial appointments is limited and the consensus-based conventions for judicial appointments lead to a centrism in ideology.¹⁸¹ As Karen Alter has noted, while the ECJ, like all courts, must operate within the bounds of acceptable latitude, “political threats against the ECJ simply ring hollow.” The Council’s power to appoint, and reappoint, judges “is an especially weak tool in the EU. While the Council formally chooses judges, there is an understanding that each country will select its own judge.” Alter notes that in EU judicial politics, as in EU parliamentary elections, a broad range of national issues “tend to take precedence over a judge’s interpretive position on European matters.” And “[o]nce appointed, the threat that the judge will not be reappointed is unlikely to influence judicial positions. ECJ decisions are issued unanimously, so it is hard to pin activism on any particular national appointee.”¹⁸² Finally, the legitimacy of adjudication is

¹⁷⁸See Mancini & Keeling, *supra* note 53, at 186.

¹⁷⁹CRAIG & DE BÚRCA, *supra* note 24, at 97.

¹⁸⁰Carol Harlow, *Voices of Difference*, *supra* note 54, at 354.

¹⁸¹See John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671 (2004).

¹⁸²ALTER, *supra* note 4, at 199-200 (citations omitted).

based more on the written law than upon a visible process by which politically accountable bodies select judges.¹⁸³

Not only is there less political control over judicial appointments in the EC, but there is also less power to overturn (or threaten to counteract) judicial decisions than in the United States. Although the power of the American Congress' to strip the Supreme Court of jurisdiction is of uncertain validity, threats occasionally materialize;¹⁸⁴ in Europe, jurisdiction-stripping would require a Treaty Amendment.¹⁸⁵ Nor can the EC legislative process react quickly and easily to unpopular judicial decisions.¹⁸⁶ While decisions concerning secondary legislation (rather than the Treaty itself) can be overridden by further legislation without requiring a Treaty Amendment, one must recall that a qualified majority (at least) was needed to adopt the measure initially and would also be needed for any amendment.¹⁸⁷ Member State concerns must be mediated through the Council, and as the ECJ rarely curtails EU authority, the Commission, which has the power

¹⁸³See Rolf Stürner, *Suing the Sovereign in Europe and Germany*, 35 GEO. WASH. INT'L L. REV. 663, 679 (2003).

¹⁸⁴See generally HART & WECHSLER, *supra* note 37, at 321-22, 326-57.

¹⁸⁵See Paul R. Dubinsky, *The Essential Function of Federal Courts: The European Union and the United States Compared*, 42 AM. J. COMP. L. 295, 310 (1994). One could view the Maastricht Treaty as akin to "jurisdiction stripping", as its addition of areas of cooperation in justice and home affairs, and common foreign and security policy in a separate EU Treaty, rather than as amendments to the EC Treaty, was precisely for the purpose of excluding the ECJ from those politically sensitive new areas. I am indebted to Bruno de Witte for this point.

¹⁸⁶See *id.* at 344.

¹⁸⁷An unusual example of a Treaty provision that partially overrides an ECJ judgment involves the so-called Barber Protocol to the Maastricht Treaty, which limited the retroactive effect of a decision that had extended the ban on sex discrimination to employer pension plans. See, e.g., Volker Roben, *Constitutionalism of the European Union after the Draft Constitutional Treaty: How Much Hierarchy?*, 10 COLUM. J. EUR. L. 339, 363 & n. 104 (2004).

to initiate legislation, is unlikely to lead the charge. More broadly, the status quo has a strong inertial force in the EC political process, in part because of a fear of opening up complex accommodations that could lead to unexpected forms of political unraveling.¹⁸⁸ For all of these reasons, legislation overturning an ECJ ruling is rare,¹⁸⁹ and a Court committed to European integration is relatively free from countervailing political pressures.

6. The Reach of Central Authority

A final set of differences between the United States and the EC directly implicates features of the initial paradoxes noted above. Despite rhetorical opposition to creeping centralization in Brussels and fears of the emergence of a European “superstate,”¹⁹⁰ in important respects--one can crudely label them “substantive” and “procedural”--the threat of centralization is far less potent in the EU than in other “federal” systems.

Substantively, Andrew Moravcsik has argued that “[c]ompared with existing domestic federations, the EU is . . . narrow.”¹⁹¹ He contends that with a few minor qualifications, the EU leaves to the Member States primary responsibility for (1) the provision of social welfare in all of its diverse aspects; (2) significant defense, military, and police policies; (3) significant education policy; (4) civilian infrastructure (*e.g.*, transport, energy, and other public works); (5) cultural policy; (6) important aspects of national legal systems (much civil rights law, policy toward

¹⁸⁸ ALTER, *supra* note 4, at 198.

¹⁸⁹ See George Tridimas & Takis Tridimas, *National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure*, 24 INT’L REV. L. & ECON. 125, 138 (2004).

¹⁹⁰ On these fears, see Moravcsik, *Rhetoric and Reality*, *supra* note 90, at 162-63.

¹⁹¹ *Id.* at 165.

religion and the family, regulation of political parties and electoral systems); (7) important aspects of environmental, land management, and natural resources policy; and (8) direct support for business.¹⁹² Of course, as a matter of legal doctrine governing “competence”, Moravcsik’s description may be questioned; Professor Lenaerts suggested some years ago that there “simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community,”¹⁹³ and the lone decision (some years later) invalidating an EC measure as beyond Brussels’ power, the Tobacco Advertising Case,¹⁹⁴ may be the exception that proves the rule. Without question, EC regulation creeps into the categories Moravcsik lists, whether as the result of Treaty obligations of non-discrimination¹⁹⁵ or of legislative measures.

But if the incursions from the center are mounting and may not be subject to effective judicial limitation, there remains something to the basic pattern that Moravcsik describes. The EU lacks plenary authority to legislate, administer, tax, adjudicate, and importantly, to govern domestic and international security. And while its expenditures may be significant in some sectors (*e.g.*, agriculture) and especially for some Member States (*e.g.*, Greece, where receipts

¹⁹²*Id.* at 166-68.

¹⁹³Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 220 (1990).

¹⁹⁴Case C-376/98, Germany v. European Parliament and Council of the European Union, 2000 E.C.R. I-8419.

¹⁹⁵See, *e.g.*, Case C-209/03, Queen (on the application of Bidar) v. London Borough of Ealing, [2005] ECR ??? (Treaty prohibition of discrimination on the basis of nationality requires Member State to provide subsidized loans to a foreign student lawfully resident to cover maintenance costs).

from the EU equal 10% of national government spending),¹⁹⁶ overall the EU's budget, as noted,¹⁹⁷ is minuscule compared to that of the United States. To be sure, debates over the present or future extent of European centralization can have a glass half-full/glass half-empty quality; no doubt some regulations and decisions have a considerable impact on Member States.¹⁹⁸ Nonetheless, in numerous respects the scope of "federal" government in the EU falls short of that in the United States, and thus poses less of a threat to Member State autonomy.

Procedurally, several features of the EC political system serve to protect state autonomy. As already noted, because the EC's budget and bureaucracy are limited, "federal" action tends to be administrative regulation. While EC regulation is far too voluminous to be viewed as anything other than highly consequential, it often takes the form (as in *Francovich*) of directives that require transposition into laws by the Member States.¹⁹⁹ While directives vary considerably in the scope of discretion they leave to Member States, there is a "widespread preference for minimum harmonization" which permits regulatory differentiation that enhances the autonomy of Member States,²⁰⁰ and since the early 1980s, EC law "in more sensitive areas has often been passed in the form of so-called 'framework directives' that in effect provide national law-makers

¹⁹⁶See Halberstam, *The Bride of Messina* (forthcoming), MS at 23-24.

¹⁹⁷See pp. ???, *supra*.

¹⁹⁸See, e.g., Halberstam, *supra* note 196, MS at 21-30.

¹⁹⁹See Lazer & Mayer-Schoenberger, *supra* note 156, at 138-39.

²⁰⁰DOUGAN, *supra* note 24, at 178.

even more freedom in implementation.”²⁰¹ Elements like these, permitting Member States to avoid uniform central impositions, have been labeled a form of “procedural subsidiarity.”²⁰²

A different type of procedural subsidiarity is the European version of the “political safeguards of federalism”²⁰³ in the legislative process. Each Member State has its representative in the (various formations of the) Council of Ministers. Those representatives, rather than being popularly elected in a campaign organized around political parties that transcend the Member State (as is true of United States Senators), are subject to national control as government members.²⁰⁴ This structural feature is a powerful protection of state autonomy. Daniel Halberstam has emphasized it in explaining why “commandeering” is viewed as a preferable

²⁰¹See Lazer & Mayer-Schoenberger, *supra* note 156, at 138-39; DOUGAN, *supra* note 24, at 201.

²⁰²See Gráinne de Búrca, *Reappraising Subsidiarity's Significance After Amsterdam*, available at <http://www.jeanmonnetprogram.org/papers/99/990701.html> (1999 Jean Monnet Working Paper Series), pp. 29-40.

²⁰³See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

²⁰⁴See Halberstam, *supra* note 9, at 235, 237. (Noting that this is a stronger state voice than existed in the United States even prior to adoption of the Seventeenth Amendment, for Senators appointed by state legislatures were not subject to recall, were not members of the state government, and were not required to join their fellow Senator in developing a shared state position.)

Larry Kramer has argued that in the United States, the constitutionally-based political safeguards of federalism, themselves never robust, have eroded (notably by enactment of the Seventeenth Amendment), but have been replaced by safeguards located, *inter alia*, in the decentralized and non-programmatic structure of political parties, in interest groups, and in the career paths of governmental officials. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994). On this view, the political safeguards of the constitutional structure of Europe can be seen as reinforced by the fact that European political parties and interest groups are even more strongly rooted in Member States than is true in the United States.

means of lawmaking in the EU and as constitutionally anathema in the United States.²⁰⁵ One might similarly suggest that the state liability for violations of EC law--especially for violation of secondary legislation rather than Treaty provisions--may seem less frightening given the role of Member States in shaping legislation.

A final phenomenon that could be viewed as an extreme form of “procedural subsidiarity”-- but perhaps is better viewed as substantive policy differentiation--is the practice of permitting states, in one respect or another, to opt out of regimes of community regulation.²⁰⁶ Michael Dougan points to “the widespread occurrence of derogations from the substantive obligations enacted by Community regulations and directives.”²⁰⁷ The Maastricht Treaty included several provisions permitting individual countries to escape EU law: the UK opted out of the Social Policy protocol, Denmark was permitted to maintain legislation on second homes, Ireland was guaranteed that its constitutional provision protecting the rights of the unborn will not be invalidated,²⁰⁸ and, most importantly, Denmark and the UK exercised their right not to join the monetary union. More recently, the Treaties of Nice and Amsterdam have institutionalized the notion of “enhanced cooperation” by a subset of Member states.²⁰⁹ But even before Maastricht (and thus at the time of *Francovich*), the more limited form of regulatory

²⁰⁵See Halberstam, *supra* note 9, at 235-38.

²⁰⁶Andrew Moravcsik, *In Defence of the ‘Democracy Deficit’*, *supra* note 115, at 610. See generally Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 COMMON MKT. L. REV. 17 (1993).

²⁰⁷DOUGAN, *supra* note 24, at 178.

²⁰⁸See generally Curtin, *supra* note 206, at 44-61.

²⁰⁹See CRAIG & DE BÚRCA, *supra* note 24, at 29-48.

differentiation noted above was in evidence.²¹⁰

The operation of these substantive and procedural safeguards in Europe depends, of course, on underlying cultural or ideological impulses that guide political behavior. The lack of a strong European collective identity,²¹¹ the persistence of strong cultural, linguistic and affective ties to diverse Member States, and the absence of strong transnational political parties reinforce those political safeguards and militate against the surrender of important national powers to Brussels by representatives of Member States in the Council.²¹²

One must not overstate the force of these safeguards. Allegiances to particular substantive policies can overcome allegiances to Member State autonomy; representatives of Member States may seek action in Brussels to avoid present or future parliamentary opposition at home;²¹³ the Commission and European Parliament are not subject to the same safeguards as is the Council;²¹⁴ and the Council has not necessarily acquiesced in ECJ interpretations of Treaty

²¹⁰DOUGAN, *supra* note 24, at 229.

²¹¹See Grimm, *supra* note 5.

²¹²See Vivien Schmidt, *Federalism and State Governance in the European Union and the United States: An Institutional Perspective*, in THE FEDERAL VISION, *supra* note 2, at 336-37 (noting that the EU is closer to a federal than a unitary system and like most federal systems, has a vertical division of powers between central and component units, but that the Member States of the EU have greater independent powers and greater control over the central government than is true in many federal systems); Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1689-90 (2002).

²¹³Young, *supra* note 212, at 1690-93.

²¹⁴*Id.* at 1694-1705.

provisions that bind Member States.²¹⁵ Nor do I mean to suggest that the limits of central authority, and these political safeguards, necessarily answer concerns about the democracy deficit. Rather, the point is simply that when all is said and done, a broad set of limitations on the exercise of “federal” legislative power in the EC have no clear analogue in the American setting. Thus, in the EC, the threat that the member states will be swallowed up by the center may seem weaker than in the US. As a result, the imposition of state liability for violation of federal law may seem correspondingly less threatening in the EC than it has seemed to the majority of Justices on the U.S. Supreme Court, and, by the same token, the protection of state “dignity” may seem of less importance in the EC than in the United States.²¹⁶

* * *

In comparing European and American approaches to state liability, one must remember that it was hardly a foregone conclusion that the doctrines associated with either polity would be as they are. Notably, in the United States, the Supreme Court has been within one vote of embracing state liability. Nonetheless, I have tried to suggest some possible explanations for the divergent paths of these two polities with respect to state liability.²¹⁷

²¹⁵See, e.g., Martin Shapiro, *The European Court of Justice*, in *THE EVOLUTION OF EU LAW*, *supra* note 1, at 332.

²¹⁶I am grateful to Gráinne de Búrca for the latter point.

²¹⁷Professor Pfander finds fewer points of institutional difference between the United States and the EC than I do. See also Halberstam, *supra* note 47, at 801 (echoing Pfander). Instead, he emphasizes the role in Europe of the *acquis communautaire*--“the member state’s acceptance of the Community as a political institution, together with all of its treaties, regulations, directives, and decisions”--as providing “a relatively firm foundation for evolutionary constitutionalism.” Pfander, *supra* note 57, at 262. Pfander contrasts the *acquis* with the equal footing doctrine, which governs admission of new states to the United States, as

IV. The Köbler Decision and the Mechanisms of Federal Judicial Supervision

The relationship of federal judicial structure to state liability doctrine is thrown into sharp relief by the ECJ's 2003 decision in *Köbler v. Republic of Austria*,²¹⁸ ruling that a Member State may be liable in damages for a national court's serious misapplication of EC law. To an American, such a result seems remarkable, as American law would interpose insuperable barriers to such liability. The contrasting approaches may be explicable when the issue is examined from the perspective of broader differences in the judicial structure of the two polities.

Professor Köbler, who had 15 years' service in EC universities but less than 15 years in Austria itself, brought suit in an Austrian administrative court, contending that the denial of a pay increase available to those with 15 years' service in Austrian universities violated his freedom of movement. The Supreme Austrian Administrative Court, the Verwaltungsgerichtshof, referred to the ECJ the question of the lawfulness of the denial; its order

backward looking, protecting states against encroachments. *Id.* at 264.

However, in both the EU and the US, new states accept both the state of the law upon entry and the prospect that federal law may change--by constitutional (or Treaty) amendment, legislation, or judicial decision--in an unwelcome fashion. Moreover, the concept of the *acquis* has limited explanatory power with regard to the imposition of unexpected federal obligations upon the six signatories of the Treaty of Rome in 1957. Even if one could argue that those nations, when they signed the SEA in 1986, might no longer have viewed state liability as unexpected, surely the direct effect and supremacy doctrines, on which *Francovich* rests, were themselves considerable innovations, hardly anticipated by the Treaty of Rome. See GOLDSTEIN, *supra* note 109, at 18 ("the first six EC states signed up for a much weaker union than the ECJ later imposed on them").

Pfander may well be correct that the *acquis* "represents . . . a fluid commitment to the continuing evolution of European law." Pfander, *supra*, at 264. But since both the *acquis* and the equal footing doctrine require states, old and new, to adhere to federal law as it stands at any given time, insofar as EC law has a greater evolutionary quality than U.S. law, the explanation, I believe, must lie elsewhere.

²¹⁸Case C-224/01, *Köbler v. Austria*, [2003] E.C.R. I-10239.

of reference expressed the preliminary view that the length-of-service increment was neither a loyalty bonus nor a reward.²¹⁹ While that reference was pending, the ECJ upheld, in *Schöning-Kougebetopoulou v. Freie und Hansestadt Hamburg*,²²⁰ a claim by a German municipal employee that denial of a similar salary increment violated EC law, but did not definitively rule on loyalty bonuses based exclusively on service with a single employer. Thereafter, the Registrar of the ECJ asked if the Verwaltungsgerichtshof wished, in light of the *Schöning-Kougebetopoulou* decision, to maintain its request for a preliminary ruling. The Verwaltungsgerichtshof sought the parties' views, since "on a provisional view the legal issue which was the subject-matter of the question submitted for a preliminary ruling had been resolved in favour of Mr. Köbler."²²¹ Some weeks later, however, the Verwaltungsgerichtshof withdrew its request for a preliminary ruling and proceeded to reject Köbler's claim, viewing the increment as a loyalty bonus to reward longstanding service in Austrian universities rather than as a simple salary adjustment.²²²

Köbler then brought a second lawsuit, this one in the Austrian Civil Court, alleging that the Verwaltungsgerichtshof, as an agency of the state, had violated his rights under EC law and seeking damages under *Francovich*. The civil court referred to the ECJ, for a preliminary ruling, questions as to both the liability of the state for judicial action and the legality of denying Köbler

²¹⁹See Martin Breuer, *State Liability for Judicial Wrongs and Community Law: The Case of Gerhard Köbler v. Austria*, 29 EURO. L. REV. 243, 244 (2004).

²²⁰Case C-15/96, [1998] ECR I-47.

²²¹*Köbler*, Paragraph 9.

²²²*Köbler*, Paragraph 11.

the increment. In this second round, the ECJ ruled that Köbler could maintain his damages action. Relying on earlier statements that the principle of state liability applies whatever organ of a Member State has violated EC law²²³ and on the proposition of international law that a state is liable for breach of an international agreement whether the violation resulted from legislative, executive, or judicial action, the Court found that the full effectiveness of EC law requires a damages remedy when a court of last instance has violated EC law.²²⁴ So ruling, it reasoned, would not impair *res judicata*, because the second action did not necessarily have the same purpose and parties as the first, and a second judgment would not invalidate the prior judgment of the Verwaltungsgerichtshof but would merely award damages.²²⁵ (One wonders what would remain, in substance, of the Verwaltungsgerichtshof's judgment denying the length-of-service increment were the Austrian Civil Court to award damages--presumably in the amount Köbler would have received had he prevailed in the first action--for the Verwaltungsgerichtshof's rejection of his claim.²²⁶) On the merits, the ECJ held that denial of the increment violated EC

²²³See, e.g., Joined Cases C-46/93 & 48/93, *Brasserie du Pêcheur SA v. Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others*, [1996] ERC I-1029, Paragraph 32; Case C-302/97, *Konle v. Republik Österreich*, [1999] ECR I-3099, Paragraph 62.

²²⁴*Köbler*, Paragraphs 31-33.

²²⁵*Köbler*, Paragraph 39.

²²⁶For an American effort to justify collateral relitigation as not undermining the validity of an initial judgment, see *Fay v. Noia*, 372 U.S. 391 (1963). There, the Court defended relitigation, in federal habeas corpus proceedings, of federal constitutional issues that had previously been resolved against the prisoner in state criminal prosecutions. The Court argued that issuance of a writ of federal habeas corpus, ordering the state custodian to release the prisoner, "cannot revise the state court judgment; it can act only on the body of the petitioner." *Id.* at 430-31. But as Justice Harlan convincingly responded, if a prisoner "is detained *pursuant* to a [state court] judgment, termination of the detention [because of a federal order directed at

law. The Court also declared the Verwaltungsgerichtshof should have maintained its request for a preliminary reference. (That point had been strongly urged by Advocate General Léger,²²⁷ who contended that the denial of Köbler's claim implicated the EC's principle of proportionality, to which the Verwaltungsgerichtshof had not even adverted, and that the conclusion that denial of the increment did not violate European law was hardly "so obvious as to leave no scope for any reasonable doubt."²²⁸)

The Court added, however, that in view of the nature of the judicial function and concerns expressed by Member States about the effect of liability on legal certainty, damages would be available only in the exceptional case in which a national court has manifestly infringed applicable European law²²⁹--which depends upon such factors as the clarity and specificity of the rule that was violated, whether the violation was intentional, whether the erroneous legal conclusion was excusable, the views expressed by a Community institution, and, notably, the court's failure to comply with its obligation to make a reference for a preliminary ruling.²³⁰ (This restrictive standard of liability for judicial acts may have been chosen because some Member States impose liability for acts of their highest judicial bodies only in exceptional

the body] necessarily nullifies the judgment." *Id.* at 469 (Harlan, J., dissenting).

²²⁷See Opinion of the Advocate General, Case C-224/01, *Gerhard Köbler v. Republik Österreich*, [2003] E.C.R. I-10239, Paragraphs 170-72.

²²⁸*Id.* Paragraph 173; see note 145, *supra* and accompanying text.

²²⁹*Köbler*, Paragraph 53.

²³⁰Compared to the general standard of *Brasserie du Pêcheur* of a sufficiently serious breach, this list of factors omits the measure of discretion possessed, while adding the failure to refer. See Adrienne de Moor-van Vugt, *Annotation on Gerhard Köbler and Republick Österreich*, 11 TILBURG FOREIGN L. REV. 782, 793 (2004).

circumstances while others (Austria included) impose no liability at all.)²³¹

In the end, the ECJ held that the Verwaltungsgerichtshof's breach was insufficiently manifest to justify liability. That was in some respects a surprising result. The Advocate General had criticized both the Verwaltungsgerichtshof's withdrawal of the referral and its failure to examine whether the increment satisfied the principle of proportionality.²³² But the withdrawal may have been viewed as less serious given the intervention of the ECJ's own Registrar.²³³ And while the Verwaltungsgerichtshof's shift in characterization of the increment was embarrassing,²³⁴ the initial characterization was provisional only, and some authority did suggest that a true loyalty bonus was lawful.²³⁵

It is also possible that the ECJ, in *Köbler*, may have sought to gain acceptance of a broad principle by limiting its consequences in the case at bar.²³⁶ Trevor Hartley has viewed introduction of the *Francovich* doctrine as similar to other ECJ innovations that are introduced gradually in the first case, establishing a general principle that "is subject to various

²³¹See Breuer, *supra* note 219, at 249-50.

²³²See Opinion of the Advocate General, Case C-224/01, Gerhard Köbler v. Republik Österreich, [2003] E.C.R. I-10239, Paragraphs 170-72.

²³³See de Moor-van Vugt, *supra* note 230, at 793-94; Wattel, *supra* note 144, at 183; Claus Dieter Classen, *Case Note on Köbler v. Republick Osterreich*, 41 COMMON MKT. L. REV. 813, 819 (2004).

²³⁴*Accord*, de Moor-van Vugt, *supra* note 230, at 794.

²³⁵See Breuer, *supra* note 219, at 250-51.

²³⁶See p. ____, *supra*. *Accord*, James E. Pfander, *Köbler v. Austria: Expositional Supremacy and Member State Liability*, forthcoming in BRIT. INST OF INT'L & COMP. L., MS at 17-20.

qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. . . . If there are not too many protests, . . . in later cases [] the qualifications can then be whittled away”²³⁷ American writers have viewed the Supreme Court’s decision in *Marbury v. Madison*²³⁸ in a similar way,²³⁹ and have also suggested that articulation of a new legal principle without attaching immediate remedial consequences to its violation permits courts to accelerate legal change by effectively giving major extensions of principles only prospective effect.²⁴⁰

However the outcome in *Köbler* is explained, Europe and the United States feature sharply contrasting approaches to actions seeking damages on the basis that a state judiciary, in a prior proceeding, violated federal law. As a first approximation, American law imposes no liability in such cases. The state itself, and thus its judicial branch, is immune, and judges sued individually for actions taken in a judicial capacity, unlike most executive officials, possess an

²³⁷T. C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 78-79 (1988). See also, e.g., ALTER, *supra* note 4, at 19, 186-88 (noting that the monetary stakes in *Van Gend en Loos*, establishing direct effect, were small and that *Costa*, which declared that EC law was supreme, awarded no relief on the basis that national law was in compliance); Karen Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in *THE EUROPEAN COURT AND NATIONAL COURTS*, *supra* note 3, at 240 (explaining political acquiescence to European integration by its incremental nature, “making little steps in integration [that] seem tolerable, and refusing the little steps [that] seem disproportionately severe”).

²³⁸5 U.S. (1 Cranch) 137 (1803).

²³⁹See, e.g., ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 40 (1960) (noting that the assertion of the power of judicial review, resulting in dismissal of the action for want of jurisdiction, in circumstances in which the Court’s power to enforce any judgment against the federal Executive was seriously in doubt, was a “masterpiece of indirection”).

²⁴⁰See, e.g., Fallon & Meltzer, *supra* note 62, at 1734; John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L. J. 87 (1999).

absolute immunity from liability.²⁴¹ Although many of the reasons underlying American immunity for judges would apply equally to *Köbler*,²⁴² one key reason given in American cases--that the availability of appeal makes a damages remedy unnecessary²⁴³--does not fully apply in Europe, as *Köbler* had no right to appeal from the Verwaltungsgerichtshof to the ECJ.

Beyond immunity, other procedural doctrines would pose additional barriers to an American version of *Köbler*'s second lawsuit. In the United States, *res judicata* ordinarily bars parties from litigating, in a second proceeding, an issue of federal law that was either litigated (issue preclusion) or could have been litigated (claim preclusion) in the first proceeding.²⁴⁴ Indeed, were the two actions filed in the same court system, it could be more than a little awkward for a lower court in the latter proceeding to disregard a decision in the former by a court of last resort,²⁴⁵ or even for a court of last resort to be asked in the second proceeding

²⁴¹See *Stump v. Sparkman*, 435 U.S. 349 (1978).

Member States in Europe, by contrast, "tend to recognise personal liability of judicial officers, and as a result 'vicarious' liability of the State, for gross negligence, denial of justice, or criminal offence." van Gerven, *supra* note 44, at 137.

²⁴²These include: " . . . the need for a judge to 'be free to act upon his own conviction, without apprehension of personal consequences to himself'; . . . the controversiality and importance of the competing interests adjudicated by judges and the likelihood that the loser, feeling aggrieved, would wish to retaliate; . . . the record-keeping to which self-protective judges would be driven in the absence of immunity; . . . and . . . the ease with which bad faith can be alleged and made the basis for 'vexatious litigation.'" PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 90 (1983).

²⁴³See *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

²⁴⁴See generally DAVID L. SHAPIRO, *CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS* 32-45 (claim preclusion), 46-60 (issue preclusion) (2001).

²⁴⁵See de Moor-van Vugt, *supra* note 230, at 790.

whether its decision in the first litigation was a manifest infringement of federal law.²⁴⁶

That particular problem was not faced in *Köbler*, where the first proceeding was in the administrative courts and the second in the civil courts. Still, those two courts belong to the same legal order. And American preclusion doctrine operates even between separate judicial systems; thus, a state court litigation has claim and issue preclusive effect in a subsequent federal court proceeding--even as to an issue of federal law.²⁴⁷ Indeed, in that precise situation, American law offers still another barrier to collateral relitigation--the much-criticized *Rooker-Feldman* doctrine, which provides that the congressional grant of jurisdiction in the Supreme Court to review state court decisions on issues of federal law impliedly excludes federal trial courts from entertaining claims "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the [federal trial] court proceedings commenced and inviting [federal trial] court review and rejection of those judgments."²⁴⁸ American res judicata doctrine, like the *Rooker-Feldman* doctrine, also draws a connection between collateral federal relitigation following a state court proceeding and the availability of Supreme Court review: in the rare cases in which, for somewhat technical reasons, a state court litigant could not have obtained Supreme Court review of a federal issue,²⁴⁹ the Court has assumed that the state court

²⁴⁶See Wattel, *supra* note 144, at 180.

²⁴⁷See *Migra v. Warren City School Dist.*, 465 U.S. 765 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980).

²⁴⁸*Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S.Ct. 1517, 1521-22 (2005).

²⁴⁹This can happen when a state court resolves a federal issue (a) when rendering a judgment that also rests on an "independent and adequate state ground", so that Supreme Court review and reversal of the state court's resolution of the federal law issue would not alter the

judgment rendered would lack preclusive effect in a subsequent federal court proceeding.²⁵⁰

It would be too much to suggest that judicial structures inhabit a Newtonian universe, in which one action (the unavailability *vel non* of federal appellate review of state court judgments) creates a corresponding reaction (the recognition *vel non* of damage actions against state courts for failure to respect federal norms). Indeed, it is conventional wisdom that the ECJ's success in its integrationist project depended upon enlisting national courts, and the cooperation could be threatened if national judges were to be rebuked for disregarding their duties under EC law. Still, one cannot help but wonder if the *Köbler* decision was motivated by concerns that many national courts of last resort were violating their broad obligation to refer issues of EC law²⁵¹ and were failing, when deciding cases following a referral to the ECJ, to carry out the fair implications of the ECJ's decision.²⁵² On this view, *Köbler* can be seen as a warning shot to Member States that a failure to refer could result in liability--that, as Paul Craig had predicted, a national court's refusal properly to apply EC law "will, literally, have a price, which is the

state court's judgment, or (b) when entertaining a dispute that is not a "case or controversy" under federal law. See generally HART & WECHSLER, *supra* note 37, at 138-40, 496-500.

²⁵⁰See *Fidelity Nat'l Bank & Trust Co. v. Swope*, 274 U.S. 123 (1927) (assuming that a state court decision of a federal issue in a proceeding that did not satisfy the federal courts' "case or controversy" requirement would not be res judicata in a subsequent federal court action).

²⁵¹On the obligation, see note 145, *supra* and accompanying text. On the failure to refer, see, e.g., de la Mare, *supra* note 135, at 233; Constantin Stefanou & Helen Xanthaki, *Are National Remedies the Only Way Forward? Widening the Scope of Article 215(2) of the Treaty of Rome*, in REMEDIES FOR BREACH OF EC LAW 85, 88-89 (Julian Lonbay & Andrea Biondi eds., 1997).

²⁵²Accord, Pfander, *supra* note 236, (MS at 4). See also Peter Van den Bossche, *In Search of Remedies for Non-Compliance: The Experience of the European Community*, 3 MAASTRICHT J. OF EUR. & COMP. L. 371, 375 (1996) (noting that "post litigation non-compliance . . . has become [a serious problem in the EC] since the mid-80s").

possibility of a suit in damages brought by an individual against the state.”²⁵³ (Interestingly, the ECJ drew on a principle of international law--that a nation is liable for treaty violations committed by any organ of government--in extending the right under *Francovich*, which is hardly a standard remedy for a Treaty violation.)

If in *Köbler* the ECJ was seeking, indirectly, to obtain a means, denied to it under the Treaties, of reviewing decisions of national courts that had made no referral, one can fairly question the legitimacy of this approach.²⁵⁴ One wonders, also, whether liability for judicial acts might have been limited way to respond more directly to a failure of a national court of last resort to meet its obligation under Article 234 to refer an issue of EC law. To be sure, because EC law provides individuals no right to have an issue of EC law referred, it may be that the damages claim would have to rest on a violation of substantive law rather than on the failure to refer.²⁵⁵ But at a minimum, that failure could open up for relitigation a claim that otherwise would be concluded.²⁵⁶

If the *Köbler* decision was in fact motivated, at least in part, by concerns about whether the EC judicial structure offers adequate resources for enforcement of EC law against Member States, the decision offers uncertain promise of remedying any shortcomings. *Köbler* surely provides an incentive for national courts to refer questions of EC law to the ECJ, at least where

²⁵³Craig, *supra* note 20, at 72.

²⁵⁴Accord, Pfander, *supra* note 236, MS at 13 & n. 61.

²⁵⁵See Classen, *supra* note 233, at 820.

²⁵⁶Insofar as liability is based upon the failure to refer, establishing causation could be difficult. See Advocate General’s Opinion in Case C-224/01, *Gerhard Köbler v. Republik Österreich*, [2003] E.C.R. I-10239, Paragraphs 149-51; Classen, *supra* note 233, at 821.

private rights are at issue.²⁵⁷ Yet the ECJ is famously overburdened and backlogged, and “the queuing time in Luxembourg (more than two years) is already unacceptable.”²⁵⁸ Moreover, if the underlying concern is the national courts’ lack of judicial cooperation (particularly a failure to refer) in the first proceeding, the damages remedy recognized by *Köbler* cannot be implemented without judicial cooperation (and possibly a referral from) the national courts in the second proceeding. It remains to be seen whether permitting the relitigation that *Köbler* authorizes is more than a stop-gap measure that highlights the need for more fundamental revision of the EC judicial structure.²⁵⁹

CONCLUSION

Comparative work has well-known limitations. As Vicki Jackson has noted, comparisons are particularly complex when they address constitutional structures, which are difficult to disaggregate, as any particular feature (*e.g.*, state liability or immunity doctrines) is only one component of a complex mixture of interactions.²⁶⁰ Nonetheless, I hope that the comparative analysis I have offered will highlight strands of thought and structure that help to account for, and thus help us better to understand, the divergent paths taken in these two federal polities.

The direction of the path taken by a particular polity is likely to depend upon a broad range of legal and political factors. Thus, the availability of one mechanism of control may

²⁵⁷See Wattel, *supra* note 144, at 178; Pfander, *supra* note 236, MS at 5.

²⁵⁸Wattel, *supra* note 144, at 179.

²⁵⁹For discussion, see, *e.g.*, Jacqué & Weiler, *supra* note 122.

²⁶⁰Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L. J. 223, 273-74 (2001).

make recognition of another less important; a general acceptance in Member State legal systems of a particular remedy, like governmental liability, may make its recognition by federal law more acceptable; robust remedies may be more acceptable when the Member States have greater control over the substance of the underlying federal obligations. In addition, basic approaches to constitutional interpretative methodology (the primacy of a non-textual, non-originalist, teleological approach of the EC versus the eclectic American approach, with important strains of originalism) may influence the choice of remedial techniques. And the willingness of judges to impose robust remedies may depend on a complex political calculus: their capacity to obtain a reasonable degree of compliance; the drift of sentiment in the polity about the exercise of federal power; and the extent to which judicial appointments respond to the course of that sentiment. These kinds of factors may, however, not determine but merely bound and influence the judicial direction--a point particularly vivid in the United States, where the doctrine of state sovereign immunity, though longstanding, has in recent years been maintained by the margin of only one vote in the Supreme Court.

But there are commonalities as well as divergences to be highlighted. By their nature, federal systems face problems in ensuring Member State compliance with federal law and must develop tools to promote compliance that are both reasonably effective against and reasonably acceptable to Member States.²⁶¹ In both polities, the courts have rejected the position that only the legislature may establish such remedies, and instead have taken it upon themselves to a considerable extent to find a path that strikes the right balance of competing objectives. In both, the path has been illuminated by doctrines governing the liability of the federal government

²⁶¹ Accord, Snyder, *supra* note 122, at 22; Pfander, *supra* note 236, forthcoming.

itself.

There are commonalities between Europe and the United States in one other important respect. Both systems have cushioned the impact of damages liability for governmental action (whether imposed directly on governments themselves, as in the EC, or on government officials, as the United States) by making liability depend not merely on the fact that federal law was violated, but, ordinarily, on a demonstration that the violation was a significant one.²⁶² That cushion is provided in the United States by the limitation of liability to violations of clearly established law, and in the EC by the requirement that the breach be sufficiently serious--which turns in substantial part on the scope of discretion left by EC law to the member state, and thus often on whether “settled case-law” makes the violation clear²⁶³ or whether the error of law was excusable.²⁶⁴ The cushions in the two systems thus bear considerably similarity, and they go a long way toward giving Member States one bite at the apple: unless they are in rather obvious violation of federal law, only prospective compliance, not compensation for past harm caused, will be required.

Thus, if constitutional remedies can be seen as serving two basic goals--providing compensation to those whose rights have been infringed, and creating a system of sanctions

²⁶²I say ordinarily because (i) municipalities enjoy neither absolute nor official immunity when sued for damages, see *Owen v. City of Independence*, 445 U.S. 622 (1980), (ii) the official immunities enjoyed by state officials in actions under § 1983 may or may not apply in actions under other federal statutes, see, *e.g.*, Meltzer, *supra* note 34, at 1357 n. 96, and (iii) Congress, when it has exercised its power to abrogate state sovereign immunity, can render states liable in damages with no such cushion.

²⁶³DOUGAN, *supra* note 24, at 244-45.

²⁶⁴See Opinion of Advocate General, Case C-224/01, *Gerhard Köbler v. Republik Österreich*, [2003] E.C.R. I-10239, Paragraph 139.

designed to ensure an adequate level of adherence to constitutional rights--both the EC and the U.S., to a considerable extent, have focused more on the latter than the former.²⁶⁵ Limiting the immediate remedial consequences of violations permits, from the standpoint of the federal polity, a more rapid evolution of substantive law,²⁶⁶ because, from the standpoint of the Member States, such evolution will be less objectionable if the costs of compliance are not immediate. Both systems, then, can be seen as sacrificing the protection of individual rights in the short-term to long-run promotion of the effectiveness of federal law and integration of the polity.²⁶⁷

²⁶⁵ Accord, Pfander, *supra* note 236, MS at 5.

²⁶⁶ Fallon & Meltzer, *supra* note 62, at 1734; Jeffries, *supra* note 36; Jeffries, *supra* note 240, at 79-80.

²⁶⁷ See sources cited note 266 *supra*.